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Issue Date: 11 December 2006

CASE NO. 2005-LHC-1575

OWCP NO. 15-47674

In the Matter of:

J. F.,
Claimant,

vs.

MATSON TERMINALS,
Employer,

and

SIGNAL MUTUAL INDEMNITY ASSN.,
Carrier.

Appearances:

Jay Lawrence Friedheim, Esq.
For Claimant

Normand Lezy, Esq.
For Employer/Carrier

BEFORE: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING TEMPORARY DISABILITY BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act as amended ("the Act"), 33 U.S.C. § 901 *et seq.*

A formal hearing was held in Honolulu, Hawaii on March 1 and 2, 2006, at which both parties were represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge's exhibits ("ALJX") 1-2;[1] Claimant's exhibits ("CX") 1, 5, 8-31; and

[1] Claimant's Third Amended Pretrial Statement is ALJX-1, and Employer's Pretrial Statement is ALJX-2.

Employer's exhibits ("RX") A-L.[2] Transcript ("TR") at 7-8, 14-15 166-177, 289. Claimant's exhibits 2-4 were withdrawn, and Claimant's exhibits 6 and 7 were excluded. TR at 168-71, 177.

On April 26, 2006, I issued Post-Trial Order #1, in which I noted that there was no need for a stipulation regarding Claimant's average weekly wage given that the current claim is only for temporary disability compensation and the parties had stipulated that Claimant is entitled to compensation at the maximum rate in effect at the time of injury, $1,030.78. I also found, based on the parties' stipulation, that Claimant's last day of work was May 16, 2004 and his period of temporary disability would begin May 17, 2004, making it unnecessary to produce any wage records. I also found that the parties waived any post-trial discovery or depositions by failing to comply with orders given at the trial, and I set a deadline for submission of closing briefs.

On May 5, 2006, I issued Post-Trial Order #2, in which I denied Employer's motion for reconsideration and admitted Dr. Davenport's February 10, 2006 deposition as RX M.

On May 5, 2006, Claimant filed his post-trial brief, which was admitted as ALJX 3. On May 9, 2006, Claimant filed his proposed order, which was admitted as ALJX 4. On May 12, 2006, Employer filed a post-trial brief, which was admitted as ALJX 5.

On June 7, 2006, I issued Post-Trial Order #3 granting Employer's motion for reconsideration of Post-Trial Orders #1 and #2. I set a schedule for submission of post-trial evidence and supplemental post-trial briefs responding to such evidence.

On July 25, 2006, Employer submitted transcripts of the depositions of Employer's superintendents Mr. Albino Aguil, Mr. Wesley Park, and Mr. Peter Kaapuni, which were admitted as RX N, RX O, and RX P, respectively.

On July 31, 2006, I issued Post-Trial Order #4, in which I set the process for the parties to take photographs of the machines used by Claimant and have their doctors/experts produce supplemental reports based on those photographs. I also amended the post-trial deadlines.

On August 18, 2006, I issued Post-Trial Order #5, in which I ruled that Employer's photographs #1-9 and that Claimant's photographs #1-2, 8-20, 30-37 could be shown to either doctor. I also reiterated the deadlines for the submission of supplemental doctors' reports and supplemental post-trial briefs.

On October 2, 2006, Employer filed its supplemental post-trial brief, which was admitted as ALJX 6. On October 3, 2006, Claimant filed his supplemental post-trial brief, which was admitted as ALJX 7.

On October 2, 2006 Employer submitted 9 photographs of a top-handler machine and a declaration by Christopher Lee, Employer's Safety Manager, which were admitted as RX Q. Employer also submitted a supplemental report by Dr. Davenport, which was admitted as RX R.

[2] Where available, all citations are to the cumulative, Bates-stamped page numbers.

On September 28, 2006, Claimant submitted 23 photographs of the machines used by Claimant at work and an August 29, 2006 supplemental report by Dr. Katz, which were received on October 10, 2006 and admitted as CX 31A and CX 32 respectively, thereby closing the record.

Stipulations:

At the hearing, the parties agreed to the following stipulations:

1. Claimant's compensation rate is $1,030.78.

2. The place of injury was Matson yards.

3. The date of the alleged traumatic injury was November 19, 2003.

4. Claimant became aware that his disability was work related on November 19, 2003.

5. This claim is for compensation and medical benefits.

6. The Longshore Act applies to this claim.

7. At the time of the alleged injury, an employee/employer relationship existed between Claimant and Employer.

8. Claimant has suffered an injury.

9. The claim was timely noticed and timely filed.

10. Employer/Carrier is not providing compensation or medical benefits.

11. Claimant has not reached maximum medical improvement.

12. Claimant has outstanding medical bills, which he will submit to Employer if it is found that Claimant is covered by section 7 of the Act.

13. Claimant is not working.

TR at 159,165-66. I accept all of these stipulations as they are supported by substantial evidence in the record. *See Phelps v. Newport News Shipbuilding & Dry Dock Co.,*16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 (1985).

Issues in Dispute:

1. Did the alleged injuries (traumatic injury to the left knee on November 19, 2003, and cumulative trauma injury to the left knee) arise out of and in the course of Claimant's employment with Employer?

2. What is the extent of Claimant's temporary disability?

TR at 166.

SUMMARY OF DECISION

I find that, as a result of his work for Employer through May 16, 2004, Claimant sustained a cumulative trauma injury to his left knee. I also find that Claimant sustained a traumatic injury to his left knee on November 19, 2003, which aggravated his left knee condition. In addition, I find that Claimant is unable to return to his usual employment, and thus, is totally disabled. Consequently, Employer is liable for Claimant's disability, including the period of temporary total disability from May 17, 2004 through the present and continuing, and medical care for Claimant's left knee condition.

FINDINGS OF FACT

Personal and Employment History

Claimant was born on April 5, 1953, and was 52 years old at the time of trial. Tr at 178. He has six children, two of whom were dependent on him as of the time of trial. Tr at 178, 285; CX 31 at 250. Claimant graduated from Castle High School in 1971. Tr at 178. Claimant held various non-longshore jobs between 1971 and 1980. Tr at 179; CX 31 at 250.

In 1980, Claimant began working on the waterfront as a laborer for McCabe, Hamilton, and Rennie. Tr at 179. In about 1982, Claimant was promoted to machine operator assistant. Tr at 179. He operated "[t]ractors, cabs, high lifts, [and] other kind[s] of equipment that lifts containers." Tr at 179. Claimant did not remember having knee problems during his employment for McCabe. Tr at 183.

In about 1987 or 1988, Claimant was hired by Matson ("Employer") as a machine operator. Tr at 183-84. Claimant is still employed by Employer, but has not worked a full shift since May 16, 2004. Tr at 185.

Thus, from 1982 to 2004, Claimant operated heavy equipment on the waterfront, first for McCabe and then for Employer. Tr at 180. He held no other jobs during that time. Tr at 185.

Claimant's Clutch Use as a Machine Operator for Employer

Beginning in 1987 or 1988 and continuing through 2004, Claimant worked for Employer as a machine operator with heavy equipment. Tr at 180-184. Claimant worked 10 to 12 hours a day, often working 7 days a week. Tr at 186.

During the time Claimant has worked there, Employer has used four types of container handling equipment: top picks, side picks, lifts, and straddlers. RX N at 237-38. Employer's superintendents Mr. Park and Mr. Aguil testified that Employer stopped using straddlers, or

straddle carriers, in 2000, at which time top handlers and side picks became the standard container carrying equipment. RX N at 237-38; RX O at 252. Mr. Aguil could not remember if the straddlers had clutches. RX N at 38. Claimant testified that his work always involved using clutches on machines. Tr at 186. Claimant testified that as a machine operator, he operated a high lift, top handler, side pick, and cab. CX 22 at 108.

Claimant testified that the controls are basically the same on a side pick and top loader. Tr at 252-55. There are three pedals: an accelerator, brake, and clutch. Tr at 254. The clutch is the only pedal you operate with the left foot. Tr at 256. The cab, or hustler, is automatic and only requires use of the right foot to operate the gas and brake. Tr at 192-94.

Claimant testified that he moved 100 to 200 containers a day and he had to "constantly drive back and forth to the bins moving these containers." Tr at 180. Claimant testified that he had to "step the clutch" every time he shifted gears from forward to reverse. Tr at 181, 255. He added that for "[e]very container you need to go up to it, push in your clutch, pick it up, bring out your clutch, go back, push your clutch in. Every movement is constantly using the clutch to operate the machine." Tr at 182. Claimant testified that the clutch is mainly used to change gears, but also "a lot of times if you're approaching the stack or reversing and didn't want to really have to shift…you would step your clutch, hold it in, and just let it glide as you're approaching the stack so you can at the same time lift the beam on the container. At lot of times, you have your foot on the clutch holding it in." Tr at 256. Claimant testified that the clutch is also used to raise the boom. Tr at 257. He stated that "your foot is on the clutch the whole time you're working. It needs to be there in case you need the machine to stop." Tr at 182-83.

Claimant agreed that stepping on the clutch involved using physical force to move the mechanical arm inside the engine, requiring use of the whole leg and knee. Tr at 258-60. Claimant could not estimate how many pounds of force the clutch requires, but testified that it was significantly harder and "no comparison to a regular [manual transmission] car." Tr at 261. Claimant explained, "It varies on each machine on the pressure of the clutch. There's some that's real hard and some that's not too bad." Tr at 183. Claimant testified, "It seems like the bigger the machine, the harder the clutch gets. These new machines that came – that Matson came up with, these side picks and top handlers, have harder clutches to push in." Tr at 220.

Claimant believes his left knee condition "was caused by me using the clutch constantly in and out." Tr at 240.

Claimant testified that he "always had an automatic [vehicle] because of my girlfriend. It was easier for her to drive an automatic….I was with her for 18 years, so we always had an automatic." Tr at 220. Thus, he testified that all of his use of clutches was on the job at Employer and on the same kind of machinery at McCabe before that. Tr at 220.

Employer submitted 9 photographs of the operator's cab area and foot pedal controls of a top-handler machine, along with a declaration of Christopher Lee, Employer's Safety Manager. RX Q. Mr. Lee stated that the "operator's cab area and controls of a top-handler are identical to those on a side-pick, the other type of container handling machine used by [Employer]." RX Q.

Claimant submitted 23 photographs of the machinery and Claimant sitting in the cab area, simulating the movements involved in pushing on the clutch. CX 31A.

Treatment of and Problems with Claimant's Left Knee Prior to November 2003

On June 18, 2002, Claimant saw Dr. Rotkin with pain behind the left knee. CX 15 at 79; RX J at 65; RX M at 161.

On March 5, 2003, Claimant was seen by Dr. Rotkin with left knee pain. CX 8 at 54; RX H at 10; RX M at 164. Dr. Rotkin noted that Claimant's left knee pain was "[p]retty bad in the morning, has trouble walking. No recent injuries, been out of work for a while." CX 8 at 54; RX H at 10; RX M at 164. Dr. Rotkin found that Claimant's knee was not swollen, warm, or tender. CX 8 at 54; RX H at 10; RX M at 164. He prescribed Bextra, and excused Claimant from work until March 10th. CX 8 at 54; RX H at 10; RX M at 164. An x-ray conducted on that date showed mild osteoarthritis of the left knee. CX 9 at 55; RX H at 11; RX M at 165.

On April 3, 2003, Claimant went to see Dr. Rotkin for other health problems, and Dr. Rotkin noted, "Left knee pain. I do not see anything here. He had it x-rayed on the 5th of last month. There is some mild osteoarthritis." CX 8 at 53; RX H at 12; RX M at 166.

Claimant testified that he banged his knee on the blinker while getting into a machine sometime before his November 19, 2003 accident. Tr at 199, 279, 301. It is unclear whether this accident with the blinker occurred in March 2003, CX 29 at 241-42; June 2003, CX 31 at 255; or July 2003, CX 22 at 110. Claimant testified that his knee was a little sore after banging it, so he called his supervisor and made a report. Tr at 199. Claimant did not get medical care as the problem seemed to resolve on its own. Tr at 301. Claimant thought that he may not have told Dr. Rotkin that this accident caused his knee pain because "maybe the question the doctor asked me was just about the left knee pain, that's all, not how I injured it…" Tr at 279-80.

At the hearing, Claimant testified that there were times prior to November 19, 2003 when he had problems and pain with his left knee. Tr at 243-44. He testified that Employer's time records would show that throughout his time on the waterfront, there have been times when he's been hurt and had to miss work. Tr at 243-44. He testified that his left knee "has been over some time that it gradually bothers me" and "over the course of me being there working I had problems with my knee." Tr at 244. Claimant estimated that he was aware that using clutches bothered his knee a year or two prior to the November 19, 2003 injury. Tr at 245. He was not sure that he ever reported this to a doctor. Tr at 245-46. Claimant could not recall having any prior knee problems like he had after the November 19, 2003 accident. CX 22 at 110.

November 19, 2003 Accident

On November 19, 2003, Claimant was operating a side pick at Section 3, Bin 22 in Matson yard. Tr at 187-88, 225. Claimant testified, "When I got to Bin 22, I noticed…there was a pothole, so I [told] the supervisors about the pothole and had a union person come out and look at it, check it. They agreed that it was alright for me to work in that bin because there was no

other room in the yard." Tr at 188. Claimant testified that he is very familiar with the Matson yard, so he tends to spot and report potholes. Tr at 296.

Employer's senior superintendent, Albino Aguil, and Employer's general superintendent, Wesley Park, each testified that he did not remember Claimant reporting a pothole prior to the alleged accident. RX N at 223-224; RX O at 259. However, they each conceded that they did not remember much from the November 2003 period generally. RX N at 228; RX O at 259. Moreover, each superintendent testified that potholes are reported to him at least once a month and that no written reports are made, so they usually do not remember pothole reports. RX N at 227-30; RX O at 258-60. Mr. Aguil also conceded that he did not remember the road condition in Bay 22 last week, last year, or in November 2003. RX N at 229. Mr. Park testified that he did not remember how many potholes were in the yard in November 2003, but that he has seen potholes in Bay 22-S3. RX O at 255. Mr. Park agreed that there could be 10 potholes in the yard at any given time. RX O at 257. They each also conceded that it would not be unusual to investigate a pothole with a union rep there as well. RX N at 230; RX O at 254-55, 258.

Claimant testified that after he reported the pothole and was told to work anyway, "I just took [a container] off one of the trucks and I was going to put it inside that bin, stack it up. I was going into the bin. I hit the pothole when my leg was extended and pushed in the clutch. I jammed it, and it instantly gave me pain." Tr at 188-89, 225-26. He explained that "it was a jamming because I was approaching the stack, and at the same time you're lifting up your container. I pushed in the clutch so I could just glide into the bin, but when I hit that pothole, it came back and jammed my knee." Tr at 189. Claimant testified that his November 2003 injury "wasn't like anything else I ever experienced. It was something that happened that just changed everything. It was really severe. It was sore. It was different than any other time." Tr at 199.

Claimant further testified, "After I jammed my knee, I turned off the machine, lowered the container, and notified the supervisor what had happened. And especially on this case because of the situation…of me notifying them prior to this I wanted [Mr. Aguil], which was the sup on the radio, wanted him to get his boss, which was Wesley Park, for both of them to come out. And when they come out to the bin, I wanted him to bring the union official that was working that day with him." Tr at 189. Claimant was unclear about whether the union official was Dennis Kanaha or Elgin Callas. Tr at 189, 227-28. He added, "They came out. They looked at the situation, asked me how I was. My knee was by then swelling up. It turned a little red." Tr at 190. Claimant was asked if he needed to go to the hospital but he declined because "I'm the type of guy that…will work with some pain, and I can't afford going out. So I just told them that I needed to rest, maybe put some ice on it, let it go down, and see what happens." Tr at 190.

Claimant testified that after the accident, he went to the office to rest for about an hour-and-a-half. Tr at 191. During that time, Mr. Aguil took down Claimant's comments about what happened and filled out an accident report. Tr at 191. After that, Claimant's knee was still too sore to return to work, so he went home. Tr at 191.

When asked whether he recalled Claimant being involved in a work-related accident on November 19, 2003, Mr. Aguil testified, "At this time, no, I don't remember." RX N at 222. He also could not remember or recall Claimant contacting him to come out to the accident site with other supervisors and union officials. RX N at 222-24.

Mr. Park testified that he did not recall anything about the November 19, 2003 accident. RX O at 251-52, 259-60. He testified that he did not believe the alleged November 19, 2003 accident happened. RX O at 259, 264. He thought such an event would stand out in his mind. RX O at 252. However, he acknowledged that an event of this type could occur and not come to his attention. RX O at 259-60. Mr. Park also testified that Claimant is a "complainer" and tends to bring in union reps when he complains. RX O at 260.

Reporting of November 19, 2003 Accident

Claimant testified that immediately after the November 19, 2003 accident, Mr. Aguil took down Claimant's comments about the accident and filled out an accident report. Tr at 191.

On or around May 13, 2004, Claimant filled out a second accident report for the November 19, 2003 accident. Tr at 232-33. He wrote, "As I was driving side pick, going into Bay 22, S3 hit a hole and jam my knee. Giving me pain." RX A at 1. He said that he did not list Mr. Park, Mr. Aguil, Mr. Kanaha, and Mr. Callas as witnesses because Mr. Aguil told him only to fill out the accident description. Tr at 235.

Claimant testified that this second accident report was completed because before he went on leave for his surgery and recovery, his supervisor, Mr. Aguil, pulled him aside and said, "We need to make another report because the other one we misplaced it and didn't turn it in to the Personnel Department." Tr at 205-06, 232. Claimant testified Mr. Aguil said it was necessary to fill out a report so that Claimant could go out on industrial leave for his surgery. Tr at 237.

Mr. Aguil testified that he did not remember preparing any accident report. RX N at 223, 236-37. He also could not remember talking to Claimant about an accident report for a previous event. RX N at 236. However, he did concede that he had seen Claimant's accident report and part of it was in Mr. Aguil's handwriting. RX N at 236. Mr. Aguil testified that he fills out two to three accident reports a year, but he conceded that he was only able to remember one specific report from this year, and did not remember any from 2003. RX N at 237.

Mr. Aguil testified that normally, an employee gets an accident report form from a supervisor. RX N at 231. The employee fills out the accident description and the supervisor fills out other parts. RX N at 231. The report is then placed in a tray and routed elsewhere in the company such that Mr. Aguil and the employee do not see it again. RX N at 232.

Mr. Aguil testified that he does not always make an accident report immediately if an injury is not serious, or if the employee does not want to fill out a report. RX N at 230-33. It would not be unusual to fill out a report a few days later. RX N at 232. However, Mr. Aguil testified that he would have filled out a report immediately for Claimant's alleged accident. RX N at 233. Similarly, Mr. Park testified that accident reports are not always written up or written

up immediately, but it depends on the severity of the accident. RX O at 257. Mr. Park testified that he learned later that an accident report was filed in May for Claimant's injury. RX O at 263.

Claimant testified that he had a copy of the first accident report in his locker at work, but when he finally went to look for it, it was not there. Tr at 218-19, 232. Claimant conceded that the delay in checking the locker was mostly his fault since he requested to have access to the locker at a time when no one else was there and because he did not have a car. Tr at 229-31. A copy of the second accident report, which Claimant had not seen since he signed it on May 13, 2004, was provided to Claimant at his deposition. Tr at 218, 290-91; CX 22.

Claimant's Return to Work Following November 19, 2003 Accident

When Claimant returned to work shortly after his November 19, 2003 accident, he asked if he could be assigned to drive a cab. Tr at 191-92; CX 22 at 125. Driving a cab did not bother his knee because it is automatic and only requires use of the right leg for the gas and brake, while the side pick and top handler require use of the left leg to push the clutch. Tr at 192, 193-94, 241. Mr. Park confirmed that Claimant made a request in December 2003 to drive only cabs due to his knee pain and problems. RX O at 260, 262.

Employer allowed Claimant to drive only cabs for a short period after the accident. Tr at 192, 241, 248; CX 22 at 125. Then, the supervisors told Claimant he would need a doctor's note if he was not able to drive the other machines. Tr at 192-93, 248-50, 298-99; RX O at 260-63.

Claimant needed a doctor's note to be assigned only to cabs outside of Employer's regular high-low assignment system. RX N at 233-35, 261. Under the high-low system, an employee who has worked a low number of hours for the year is assigned to drive a cab, while an employee who has worked a high number of hours is assigned to drive a side pick or top handler. Tr at 194. The policy is designed to enable employees to increase their hours by assigning them to the machines that are most likely to be used every day. Tr at 195-96.

Claimant went to see Dr. Rotkin on December 10, 2003 to obtain a note stating that he should only drive cabs. Tr at 196-97. Dr. Rotkin gave Claimant a note that allowed him to drive only cabs for one month. Tr at 197.

Mr. Park confirmed that Claimant did get a note and return to work. RX O at 262. Claimant testified that, at first, Employer would not honor his note, but they later agreed to honor it through the end of the year after the union intervened. CX 22 at 126.

Because the high-low hour count had started fresh in the new year and Claimant had a low number of hours, he was able to drive cabs almost exclusively for about four months. Tr at 197-98. Mr. Park confirmed that the high-low system starts anew in January of each year, such that Claimant might not have needed a note to drive only cabs in January. RX O at 261. Because he was able to keep driving cabs, Claimant did not have knee problems or need another note from Dr. Rotkin during that time. Tr at 198.

Claimant testified that when he had to return to driving the other machines in about March or April 2004, his knee hurt. Tr at 241-42. Claimant testified that after his November 19, 2003 injury, "every time I used [the clutch on the side picks and top loaders] my knee bothered me." Tr at 242. He explained that operating the clutch had caused him problems and pain before, but "[d]own there you learn to work with pain so that you don't lose time and money. After that hit, that really hurt my knee more than any other time." Tr at 243.

Medical History After November 2003 Accident Through May 2004 Surgery

On December 5, 2003, Claimant went to see Dr. Rotkin for his annual industrial physical exam. Tr at 249; RX H at 13-14; RX M at 167. Dr. Rotkin noted that Claimant had "no new complaints." RX H at 13; RX M at 167. He also noted that Claimant had a medical history of arthritis. RX H at 14; RX M at 168. Dr. Rotkin cleared Claimant without restrictions for his commercial driver's license and crane operator's license. RX H at 13; RX M at 167.

Claimant testified that he needed to pass the physical to be certified for his commercial driver's license to work as a machine operator. Tr at 249. He did not complain about his knee because "I was there for a physical." Tr at 249.

On December 10, 2003, Claimant went to see Dr. Rotkin. CX 8 at 52; RX H at 15; RX M at 169. Dr. Rotkin noted, "Patient presents with work injury. Hurt his left knee about three weeks ago in the evening. He does not remember the exact time but he did report to his employer, what he has noticed is that if he works driving a top loader or a side pick, that fact that he has to use his left leg continuously pumping up and down on the clutch, causes pain and whereas if he drives a cab he is okay. He has not missed work yet, but he would like a letter indicating that he should not be driving the top loader or a side pick." CX 8 at 52; RX H at 15; RX M at 169. Dr. Rotkin also noted, "No warmth, swelling, or erythema in the left leg. Patient does walk with a limp." CX 8 at 52; RX H at 15; RX M at 169. Dr. Rotkin provided Claimant with a note indicating that he should not be driving the top loader or side pick for a month, but he was able to drive a cab. CX 24 at 198, 201; CX 26 at 228; RX M at 169.

Claimant was seen in the emergency room on December 14, 2003, and was released to return to work in two days with no restrictions. CX 24 at 199-200. Claimant saw Dr. Rotkin for unrelated health problems on February 23 and 25, 2004. RX H at 16-17; RX M at 170-71. He was given a slip to be off work February 18 to 22 and February 23 to 25, 2004. CX 24 at 197.

On April 7, 2004, Claimant returned to Dr. Rotkin because he had missed work due to his knee. CX 8 at 51; RX H at 17a; RX M at 172. Dr. Rotkin noted that Employer had refused to create any light duty work for him. CX 8 at 51; RX H at 17a; RX M at 172. Dr. Rotkin noted that Claimant had "[l]eft knee pain recurrence, occasionally severe with nothing on exam or x-ray to explain." CX 8 at 51; RX H at 17a; RX M at 172. Dr. Rotkin referred Claimant to Dr. Katz in Orthopedics. CX 8 at 51; RX H at 17a; RX M at 172. An x-ray conducted on April 7, 2004 showed mild left knee osteoarthritis. CX 9 at 56; RX H at 18; RX M at 172. Dr. Rotkin gave Claimant a slip for being off work through April 6, 2004. CX 24 at 196; CX 26 at 226.

Claimant testified that he had returned to using all of the machines around this time, and he had been missing work because he had "good days and bad days" with his knee. Tr at 200. He testified, "The doctor asked me if it was possible for me to have some light duty, and I mentioned to him that on the waterfront there's no such thing as light duty." Tr at 201.

On April 14, 2004, Claimant was seen by Dr. Neil Katz. CX 8 at 49; RX H at 19; RX M at 174. Dr. Katz noted, "Patient states that he was driving a top handler machine, and apparently, the machine went into a hole or something similar to that causing him to jam his left leg. Patient states he had pain in the front of the leg….Patient states the swelling seems to fluctuate overtime [sic] as does his pain." CX 8 at 49; RX H at 19; RX M at 174. Dr. Katz also noted, "He denies any preexisting injury to his left knee. (Note, review of his x-ray shows that on March 2003 he did have x-rays done of the left knee. When asked about that, he states he cannot remember what it was for. Review of the clinical notes showed that the patient did see Dr. Rotkin for left knee soreness. He was treated with Bextra and apparently never really went back to have it evaluated after that with the assumption that maybe he was doing fine.)" CX 8 at 49; RX H at 19; RX M at 174. Dr. Katz also noted, "Examination of the left knee shows mild effusion and mild patellofemoral crepitus. No significant medial or lateral ligamentous laxity. Negative Lachman. Negative anterior drawer. Patient does have some tenderness over the patellar tendon anteriorly (and has similar tenderness on the right). There is posteromedial joint line tenderness. Increase in McMurray's, Apley grind, and bounce home as well as to lesser extent squatting. Squatting also causes anterior pain." CX 8 at 49; RX H at 19; RX M at 174. Dr. Katz's impressions were left knee patellofemoral stressing and left knee medial meniscus tear. CX 8 at 50; RX H at 19; RX M at 174. Dr. Katz discussed treatment options with Claimant and they agreed to do an arthroscopy for further evaluation. CX 8 at 50; RX H at 19; RX M at 174.

Claimant explained that he did not mention his June 2002 or March 2003 knee problems to Dr. Katz because "it didn't come to me because it wasn't that serious." Tr at 202. Claimant only considers an injury serious if it causes him to miss work. Tr at 202.

On May 12, 2004, Dr. Katz did a preoperative evaluation of Claimant for the arthroscopy scheduled on May 21, 2004. CX 8 at 47-48; RX H at 21-22; RX M at 176-77. Dr. Katz noted that the earlier "X-ray from the Honolulu Medical Group showed mild degenerative joint changes." CX 8 at 48; RX H at 22; RX M at 176. Also on that date, Dr. Rotkin noted, "This was a work-related knee injury. Was not put on worker comp initially because he was not missing work." CX 8 at 44; RX H at 20; RX M at 175. Dr. Rotkin gave Claimant a work slip stating, "[left] knee injury at work 11/03 – for surgery 5/21/04." CX 24 at 191; CX 26 at 230.

On May 21, 2004, Dr. Katz performed the left knee arthroscopy. Tr at 203; CX 8 at 41-42; CX 10 at 57-60; CX 28 at 233-39. During the arthroscopy, Dr. Katz performed debridement of chondromalacia of the medial femoral condyle and patella. CX 8 at 42. His postoperative diagnoses were left knee medial femoral condyle chondromalacia and left knee patellar chondromalacia. CX 8 at 42. Dr. Katz gave Claimant a slip to be off work until June 30, 2004. CX 13 at 3; CX 20 at 92; CX 24 at 189.

Post-Surgery Release to Return to Work

On June 9, 2004, Claimant followed up with Dr. Katz. CX 8 at 38; RX H at 23; RX M at 178. Dr. Katz found that Claimant's wound was healing well and his range of motion was "close to normal with stiffness at the extremes." CX 8 at 39; RX H at 23; RX M at 178. Dr. Katz noted, "[Claimant] was advised that while he is expected to be able to physically return to work and return to full activities, it may be inadvisable to do so given the grade III chondromalacia on a weightbearing surface of his distal medial femoral condyle. In fact, the patient is advised that impact activities may be ill advised even though he will be physically capable of doing them since they may speed up the wear and tear on his knee necessitating further surgical intervention." CX 8 at 38; RX H at 23; RX M at 178. Dr. Katz also advised Claimant that he would likely need further surgery and/or a knee replacement in the future. Tr at 204; CX 8 at 39; RX H at 23; RX M at 178. Dr. Katz referred Claimant for physical therapy and gave him a slip to be off work from June 9 to 23, 2004. CX 8 at 39; RX M at 178; CX 13 at 72.

Dr. Katz testified that the June 9, 2004 post-operative visit was to ensure that Claimant understood how different activities would affect the progression of his knee condition. Tr at 32. Dr. Katz testified that "when there is damage like he had to both the kneecap and the end of the thigh bone, there is no question that he's going to have more problems down the road. The real issue becomes then, well, how can you minimize the progression of those and the speed at which they occur." Tr at 32. Dr. Katz explained that he told Claimant it would be inadvisable for him to return to work because "once the surgery is done and things 'heal,' you feel better for a while, and so you're physically capable of doing more. But given the amount of wear and tear in the end of the thigh bone and the kneecap that already exists, it's only a matter of time no matter what we do when that's going to wear out. So if you want to minimize how quickly that's going to happen and how severe it is, there are things to avoid…" Tr at 34. Dr. Katz testified that he only restricted Claimant from doing impact activities, and not from doing work with clutches, because "[t]hat was all I was aware of at the time." Tr at 67.

On June 21, 2004, physical therapist Joey Aukai wrote an initial evaluation report. CX 12 at 68. He stated, "[Claimant] reports injury occurred pressing foot pedals – brake and clutch." CX 12 at 68. Mr. Aukai assessed left knee pain, stiffness, and swelling; range of motion deficits; strength deficits; and gait deviations. CX 12 at 69. He opined that Claimant's rehabilitation potential was good. CX 12 at 69.

On June 30, 2004, Claimant followed up with Dr. Katz, who noted, "[Claimant] states that overall, he is doing well but he still did not believe he is yet ready to return to work…. Physical examination today shows limit[ed] range of motion and stiffness, but the effusion has gone. Patient still complains of some sensitivity over the incision site." CX 8 at 38; RX H at 24; RX M at 179. Dr. Katz also stated, "Patient would continue in therapy, but we have strongly advised him that we plan on letting him go back to work at next visit which will be in one month's time." CX 8 at 38; RX H at 24; RX M at 179. Dr. Katz gave Claimant a slip to be off work from June 30 to July 28, 2004. CX 13 at 71; CX 20 at 92; CX 24 at 183-86; CX 26 at 222.

Dr. Katz testified that on June 30, 2004, he believed Claimant should be ready to return to work based on his examinations and surgical findings. Tr at 37, 68. Dr. Katz testified that Claimant did not feel he was capable of returning to work, but Dr. Katz could not remember why. Tr at 68-69. Dr. Katz explained that "as the treating physician, we'll take patients at what they tell us…. if a patient tells me he's not ready to go back to work, he knows his job much better than I could ever know it. He's probably not ready to go back to work." Tr at 69. Dr. Katz testified that despite taking Claimant at his word that he did not feel able to work, he was still "trying to push for" Claimant to return to work in a month. Tr at 69. Dr. Katz testified that he used the words "strongly advised" because "[t]ypically when we see people in follow up, my whole objective is to try to get them back to full function, whether its work or just life in general. So when I saw him in June of 2004, the concern I had at that point was that he still wasn't ready, and I wanted to push him to be ready. So when that happens, I always tell the patients in no uncertain terms what my expectations of them are, and that's what I was referring to." Tr at 67. Dr. Katz testified that he wanted Claimant to return to regular, full-duty work but "unfortunately I wasn't really aware of what that meant." Tr at 68.

Also on June 30, 2004, physical therapist Mr. Aukai noted that Claimant's progress was "fair." CX 12 at 67. He reported that Claimant was working on improving his range of motion and strength, and he was restricted from running, jumping, squatting, and leg extensions. CX 12 at 67; RX H at 25; RX M at 180.

On July 28, 2004, Claimant followed up with Dr. Katz, who noted, "The patient states that he has made somewhat [sic] progress, but does not feel that he is ready to return to work…. The therapist feels that he is not yet strong enough to return to his usual customary work. We will therefore renew his physical therapy and recheck him in another month. If he and the therapist feel that he is ready to return to work sooner, he will contact us earlier." CX 8 at 37; RX H at 26; RX M at 181.

Dr. Katz testified that on July 28, 2004 Claimant again did not feel able to return to work, but Dr. Katz did not recall why. Tr at 70. When Claimant's physical therapist communicated that Claimant was not yet strong enough to return to work, Dr. Katz understood this to mean that Claimant had not adequately strengthened his quadriceps muscles to support his knee joint. Tr at 71. Dr. Katz testified that this lack of progress was not necessarily the result of inadequate effort by Claimant. Tr at 71. He also testified that the fact that Claimant had nearly full range of motion and no tenderness over the joint line did not indicate he had functional capacity or strength in his knee. Tr at 72. Dr. Katz testified that he recommended another month of physical therapy and noted that Claimant could return to work earlier if he and his physical therapist felt he was ready because he was focused on getting Claimant back to work. Tr at 73.

Also on July 28, 2004, physical therapist Mr. Aukai noted that Claimant's progress was good to fair. CX 12 at 66. He recommended that Claimant continue physical therapy for a month and hold off on returning to work. CX 12 at 66; RX H at 27; RX M at 182.

On August 23, 2004, physical therapist Mr. Aukai wrote a second initial evaluation report. CX 8 at 35-36; RX H at 28-29; RX M at 183-84. Mr. Aukai noted, "[Claimant] states he still experiences pain with extended standing and walking, going up and down stairs, squatting,

and with cold weather." CX 8 at 35; RX H at 28; RX M at 183. Mr. Aukai assessed left knee pain, stiffness, and swelling; range of motion and strength deficits, and gait deviations. CX 8 at 36; RX H at 29; RX M at 184. He stated, "Patient continues to report that pain and weakness restricts his functional status. He is not ready to return to work at this time." CX 8 at 36; RX H at 29; RX M at 184. Mr. Aukai opined that Claimant's rehab potential was good. CX 8 at 36.

On August 25, 2004, Claimant followed up with Dr. Katz. CX 8 at 33; RX H at 30; RX M at 185. He noted, "Patient states he is still having pain and he has been active for a while. He does feel that he making progress with therapy." CX 8 at 33; RX H at 30; RX M at 185. Dr. Katz also noted that Claimant "was recently thrown out of his home by his girlfriend and is living on the beach with his two sons." CX 8 at 34; RX H at 30; RX M at 185. Dr. Katz's physical exam showed full range of motion, healed wounds, and no tenderness or swelling. CX 8 at 33; RX H at 30; RX M at 185. Dr. Katz gave Claimant a slip to return to full duty work with no restrictions on August 31, 2004, but noted that Employer must allow him to attend physical therapy. CX 13 at 74; CX 20 at 93; CX 24 at 182; CX 26 at 22; RX H at 30-31; RX M at 185-86. Dr. Katz again referred Claimant for more physical therapy and expressed hope that Claimant would make more progress. CX 11 at 62; CX 8 at 33.

Dr. Katz testified that his staff confirmed that Claimant understood that he was being returned to work. Tr at 76-77. Neither Dr. Katz nor Claimant could recall whether Claimant expressed that he did not feel able to return to work. Tr at 76, 263-64. However, Claimant testified that he was puzzled when Dr. Katz told him he was ready to return to work. Tr at 262. Claimant testified, "To me, it was kind of strange because prior to that…he mentioned that I might need a knee replacement and that I would need physical therapy to strengthen my knee and other medical treatments, and then a couple weeks later or a month later I go back in and he tells me I'm perfectly fine. That was just kind of puzzling to me that within that period of time I actually only went to therapy, and it didn't seem like it was strong enough." Tr at 263-64.

Claimant's Attempt to Return to Work on August 31, 2004

Claimant testified that he wanted to return to work in August 2004. Tr at 211. He was only receiving about $450 per week in long term disability insurance ("LTDI") benefits, compared to having earned over $120,000 a year in his best year at Employer. Tr at 212. He also testified that he was homeless and his car had been repossessed, which was particularly difficult because Claimant's two sons were still dependent on him. Tr at 212.

Claimant testified that on the night shift of August 31, 2004, he went to work and showed the supervisor, Peter Kaapuni, his work release slip. Tr at 214, 264. Claimant stated, "The ship was late to come in, so I mentioned to him, 'I'm going to go down to the machine before we start working to see if I can operate the machine.' I went down there, and it might have been 45 minutes…. I got into the machine and doing the actual movement which I would basically need to operate the machine, it bothered my knee. It became a little sore. The more I did it, the more sore it got." Tr at 264-65. Claimant testified that he actually turned the machine on and was "putting it into gear to try to just work the knee to see if I could do the job," Tr at 266, but that working the clutch irritated his knee. Tr at 214, 267, 275. Claimant testified that another machine operator, Steve Takushi, observed him the entire time he was on the machine. Tr at

266. Claimant could not remember whether he tried a side pick or top handler, but testified that it does not matter since they operate interchangeably. Tr at 265-66. Claimant stated, "After some time, I went back upstairs and told Mr. Kaapuni that I tried, and that it's bothering…my knee. He suggested to me I should go back tomorrow and go see a doctor and explain it to him." Tr at 264-65. After that conversation, Claimant left work. Tr at 265.

Peter Kaapuni, Employer's senior superintendent, testified by deposition. RX O at 273. Mr. Kaapuni was responsible for checking in and assigning the machine operators on August 31, 2004. RX P at 274. He testified that he checked Claimant in and told him he was assigned to work on a top handler for that shift. RX P at 274. Mr. Kaapuni testified that Claimant responded that he could not do the assignment due to his injury. RX P at 274-75. Mr. Kaapuni recalled standing in the hallway of the break room area with Mr. Takushi and Claimant when Claimant said he could not operate the machines. RX P at 279. Mr. Kaapuni responded that "if he wasn't able to do what he was supposed to do, he needed to go back to the doctor." RX P at 274. Mr. Kaapuni did not recall Claimant saying that he had tried to operate the machines. RX P at 275. Mr. Kaapuni has known Claimant since childhood, so he took Claimant at his word when he said he could not work and did not ask Claimant how he knew that. RX P at 278. Mr. Kaapuni testified that this was the only contact he had with Claimant that evening. RX P at 274-75.

Mr. Kaapuni did not remember Claimant going out after the check-in to try the machines. RX P at 278. Mr. Kaapuni testified that Claimant could have tried out the equipment with Steve Takushi before check-in and he would not have known. RX P at 274-75; 277-79. He testified that it is not unusual for employees to show up early at about 5:00 p.m. RX P at 277. He testified that there would be no problem with Claimant arriving at 5:00 pm and walking to the garage area by 5:05 and trying out the top handler for 45 minutes before check-in. RX P at 278, 279-80. He also confirmed that Steve Takushi was working that night. RX P at 278-79.

Mr. Park also recalled that Claimant "came back and he was on the call-out sheet, but he didn't work." RX O at 263. Mr. Park was told that Claimant showed up on August 31, 2004, but he did not actually see him. RXO at 253.

Medical History After September 2004

Claimant testified that he had some knee pain upon waking up on September 1, 2004 after attempting to work on August 31, 2004. Tr at 269. Claimant testified that he tried to see Dr. Katz that day so he could "reconsider or look in my knee and maybe give me a note stating that I can't work." Tr at 214, 268. Claimant testified that he was refused by Dr. Katz's office and was directed to see Dr. Rotkin instead. Tr at 215, 268-69, 275. However, when asked why the medical records do not show him going to Dr. Katz until a week later, Claimant conceded he might have been mistaken on the dates and guessed that he might have waited a week because his knee was not bothering him that much. Tr at 271. Claimant also could not recall actually seeing Dr. Katz as the records reflect. Tr at 271-72.

On September 8, 2004, Claimant followed up with Dr. Katz. CX 8 at 32; RX H at 33. Dr. Katz noted, "He states he is still having pain in the front of the knee. He states that particularly with squatting and leg extension that he is having pain as well as getting in and out

of the cab of his truck." CX 8 at 32; RX H at 33. Dr. Katz also stated that he "had a very long discussion with the patient about the proper techniques to get in and out of his cab…" CX 8 at 32; RX H at 33. Dr. Katz recommended physical therapy and ultrasound, and directed Claimant to speak to Dr. Rotkin about social issues and his homelessness. CX 8 at 32; RX H at 33.

Dr. Katz could not recall whether Claimant reported to him on September 8, 2004 that he had attempted to return to work. Tr at 81-85. Dr. Katz conceded that he did not note that in his records. Tr at 82-85. Dr. Katz testified that the fact that Claimant attempted to return to work is "implied in that he was having trouble with…squatting, leg extensions, getting in and out of the cab." Tr at 85. Dr. Katz testified that he did not know whether Claimant referred to a personal or work vehicle when he complained of pain getting in and out, but he testified that "it would apply to getting in and out of any vehicle." Tr at 79-81. Dr. Katz thought Claimant could return to work after Dr. Katz showed him "a way to get in and out of the machine without stressing the joint" but that the fact that Claimant was unable to return to work "would tell me that I was wrong and that doing that alone was not enough to alleviate the pain…" Tr at 40.

Claimant could not recall whether he told Dr. Katz specifically that he had problems with his knee when he tried to return to work. Tr at 272, 275. He testified that where Dr. Katz noted that Claimant complained about getting in and out of the cab of his truck, he was referring to the cabs "that we drive at the job site. I had a hard time getting in and out because to get in and out you're sitting in a tight space….you need to be careful…" Tr at 273. However, Claimant was unsure why he would have complained about this on September 8, 2004 since he had not operated a cab since before his surgery. Tr at 273-74. He testified that he did try getting into a cab once and it did not bother him. Tr at 274-75. He also testified that "even like a side pick or top handler, to get in and out it was difficult just me bending my knees." Tr at 273.

Also on September 8, 2004, physical therapist Mr. Aukai noted that Claimant was still reporting pain upon squatting and "could not tolerate getting in/out of work vehicles." CX 12 at 65; RX H at 36; RX M at 187. Mr. Aukai opined, "He has good mobility and flexibility but exhibits strength deficits and restrictions." CX 12 at 65; RX H at 36; RX M at 187.

On September 9, 2004, Claimant was seen by Dr. Rotkin. CX 8 at 30; RX H at 34. Dr. Rotkin noted, "Dr. Katz told [Claimant] he is ready to return to work. Patient tried and lasted about 45 minutes. He saw Dr. Katz yesterday and…Katz said that [Claimant] was ready to return to work. Patient says that he cannot, [because it] hurts to[o] much." CX 8 at 30; RX H at 34. Dr. Rotkin also noted, "I discussed situation with Dr. Katz, who tells me that both he and the physical therapist agree that the patient should be ready to go to work. I called the physical therapist Choy from Kaneohe therapist [sic], who in fact said that his feeling was that the patient was not ready to go back to work [and] that Dr. Katz persuaded him after Katz had come up with a better way for the patient to get into the cab." CX 8 at 30; RX H at 34. Dr. Rotkin noted, "We will get a second opinion from another orthopedist about patient's ability to return to work….In the interim, I will keep the patient out another two weeks." CX 8 at 30; RX H at 34.

Dr. Katz does not recall the conversation with Dr. Rotkin, but has no reason to doubt it. Tr at 85-87. Dr. Katz also did not recall talking to the physical therapist but conceded that "it doesn't surprise me that I would say that about any patient because typically I'll speak to the

physical therapist and tell them what our objectives are and tell them ways to try to accomplish that. So the fact that I don't remember with [Claimant] doesn't really mean much." Tr at 86-87.

Claimant testified that he told Dr. Rotkin on September 9, 2004 that he had tried to go back to work but it hurt his knee too much. Tr at 275-76. Claimant could not remember why he told Dr. Rotkin and not Dr. Katz but guessed that it may have been based on what each doctor asked him. He stated, "when you work on the waterfront, you learn to work with pain, and until somebody specifically asks for a specific answer do you give it to them." Tr at 276.

On September 21, 2004, Dr. Rotkin noted that Claimant complained that physical therapy was not helping him. CX 8 at 29.

On September 29, 2004, physical therapist Mr. Aukai wrote a re-evaluation report. CX 12 at 63-64; RX H at 37-38; RX M at 188-89. Mr. Aukai noted, "Patient has attended PT from 8/25/04 to the present for a total of 12 visits. He states he feels his leg is getting stronger but he still cannot tolerate extended standing and walking, climbing ladder, going up and down stairs, and squatting." CX 12 at 63; RX H at 37; RX M at 188. Mr. Aukai assessed left knee pain, stiffness, and crepitus; range of motion and strength deficits; and functional restrictions. CX 12 at 64; RX H at 38; RX M at 189. He stated, "Patient continues to report that pain and weakness restricts his functional status. He is not ready to return to work at this time because he cannot execute his job demands without aggravation." CX 12 at 64; RX H at 38; RX M at 189. Mr. Aukai lowered his opinion of Claimant's rehabilitation potential to "fair to good." CX 12 at 64.

On September 30, 2004, Claimant followed up with Dr. Katz, who noted, "Patient continues to have symptoms and is not improving to the point that he believes that he is ready to return to work. His physical therapist sent us a note conf[i]rming that. The therapist does not feel he is ready to return yet either. It is now approaching 4½ to 5 months postop and one would expect that his symptoms would have improved dramatically by now. We really do not want him to do any squatting or leg extensions anyway and he believes that he cannot do his current job if he is not allowed to squat….the patient will be given one more go round of therapy but we expect him to go independent with it after that." CX 8 at 28; RX H at 35.

Dr. Katz testified that he thought Claimant should have been better by that time and was surprised that he was not, but he was unsure why Claimant had failed to improve. Tr at 92. Dr. Katz testified that he felt confident concluding that Claimant could not return to work based on the physical therapist's opinions and Claimant's representations that he could not squat and he needs to squat to do his job. Tr at 92-95. However, Dr. Katz conceded that, in reaching this conclusion, he did not review a job description or physical requirements list for Claimant's job. Tr at 94. Dr. Katz understood the physical demands of Claimant's job "to some extent." Tr at 94. Dr. Katz explained that he credited the physical therapist's opinions about Claimant's ability to return to work. Tr at 88-89. He testified that the physical therapist's opinions are not just based on the Claimant's subjective reports. Tr at 88-89. He testified that "the physical therapist has the ability to test people in their gyms or their clinics by having them do exercises which may or may not simulate their work environment. I don't really have that ability in the office." Tr at 89. Dr. Katz added, "The other advantage that the therapist has over the physician is they see people typically three times a week, rather than maybe once a month, so they get a much

better feel for the individual. They get a much better understanding of what their motivations are, what their effort level is, and also what their job requirements are, and what their social situation is…. It's normal for them to have all kinds of conversations with them. So the therapist always gets to know the patient much better than the doctor does." Tr at 89.

Claimant could not remember whether he told Dr. Katz on September 30, 2004 that he had tried to return to work or that operating clutches caused pain and problems in his knee. Tr at 277. Claimant also does not remember telling Dr. Katz that he could not return to work if he was not allowed to squat. Tr at 277. Claimant testified that he did not return to Dr. Katz after September 30, 2004 because "I just wanted somebody to medically treat my knee and to really find out what was going on…. it didn't seem like, you know, he was aware of my condition and the pain I was getting. I still had pain and nothing was being done." Tr at 278.

On November 29, 2004, Claimant followed up with Dr. Rotkin, who noted that Claimant was having serious health problems due to his homelessness and Employer's refusal to cover his medical care. CX 8 at 27; RX H at 30. Dr. Rotkin sent Employer a slip indicating that Claimant was expected to be able to return to work on December 30, 2004. CX 20 at 94; CX 24 at 1780; CX 26 at 221; RX H at 30.

On December 14, 2004, Dr. Rotkin found that Claimant's left knee was minimally swollen and warm. CX 8 at 26; RX H at 44. He stated that Claimant was still having pain with walking and was not physically capable of working. CX 8 at 26; RX H at 44. Dr. Rotkin stated, "Whole issue is being contested by his work comp carrier for no reason that I can determine. Patient apparently is getting caught up in the system. His supervisor lost his initial report so the work comp carrier is denying that this is work comp related even though the supervisor has put in a subsequent report [and] even though I have documented clearly in my 12/10/03 note that the patient had hurt himself several weeks before and was still at work." CX 8 at 26; RX H at 44.

On December 15, 2004, Dr. Rotkin wrote a letter to Carrier's claims handler stating, "This is a notification under workman's compensation rules that [Claimant's] knee injury related to his November 2003 work injury is not resolving. At this time, I plan to restart physical therapy and refer the patient to an orthopedic surgeon….My records made very clear that this knee problem is work related." CX 8 at 25; CX 17 at 88; RX H at 45; RX M at 194.

On January 4, 2005, Claimant followed up with Dr. Rotkin, who referred him to orthopedic surgeon Dr. Jay Marumoto. CX 8 at 24. Dr. Rotkin also noted that Claimant's "home situation has deteriorated further." CX 8 at 24. Dr. Rotkin gave Claimant a slip to be off work until February 4, 2005. CX 20 at 95; CX 24 at 178; CX 26 at 220.

On January 18, 2005, Claimant was seen by Dr. Marumoto, who noted, "[Claimant] reports injury to left knee November 2003. While driving a work vehicle pushing a clutch his vehicle hit a hole jamming his left knee. Progressively worsened. Had surgery by Dr. Neil Katz [in] May 2004. The patient states that immediately after surgery, Dr. Katz told him he would need another surgery. The patient is frustrated because he states that at his next appointment he would not need another surgery. He continues to have pain which he describes in his retropatellar area which is aggravated by standing and walking. He does not feel he can return to

work with his knee and current condition." CX 14 at 75; RX H at 46; RX M at 195. Claimant signed a release allowing Dr. Marumoto to obtain copies of his medical records. RX H at 49; RX M at 198. Claimant testified that when he went for his next appointment with Dr. Marumoto, it had been cancelled by claims adjuster Heidi Kahlbaum. Tr at 216.

Claimant continued see Dr. Rotkin approximately every month from late 2004 through 2005 to check his knee and get slips stating that he was unable to work, so that he could collect long term disability insurance. Tr at 207-08; CX 18 at 84-87; CX 20 at 96-100; CX 24 at 171-77; CX 26 at 213-19; RX H at 51-52; RX M at 200, 206. During these visits, Dr. Rotkin noted difficulties caused by Claimant's homelessness and Employer's refusal to pay him compensation or provide medical treatment. RX H at 53, 59, 62; RX M at 208, 210, 211. Dr. Rotkin advised Claimant on October 4, 2005 that he was leaving his medical practice. Tr at 208; RX H at 62; RX M at 211. On December 15, 2005, Dr. Rotkin gave Claimant a final slip to be off work until March 1, 2006. CX 20 at 101; CX 24 at 169-70; CX 26 at 211-12.

Claimant's Current Status and Condition

Claimant testified that every time he bends or straightens his knee there is a knocking inside that causes him pain. Tr at 261-62. He also has pain in his whole knee just when sitting still. Tr at 262. Claimant testified that his right knee is bothering him now, too. Tr at 289.

Since he has been off work, Claimant first received sick leave benefits and then received LTDI benefits of about $450 per week. TR at 284. Claimant testified that without another doctor's note, he would be unable to continue receiving LTDI. Tr at 208, 221-224. Claimant also has no access to medical care. Tr at 208, 217-18. Claimant testified that if he had medical care, he would seek treatment for his knee "because I need to go back to work." Tr at 219.

Claimant is currently living on Kualoa beach, and occasionally stays with his girlfriend if his knee is feeling particularly bad. He cannot live with his girlfriend all the time because of his boys. Tr at 286. When asked to describe his current daily activities, Claimant stated that he does "[n]othing, because my knees are getting worse. It's hard for me to walk. I have no medication. So I just either sit on a beach or sit in my car, take care of my kids." Tr at 289.

Medical Expert Opinions Regarding Causation

Dr. Katz

Dr. Katz was Claimant's treating orthopedic surgeon in this case. Dr. Katz is board certified in orthopedic surgery. Tr at 16.

On February 21, 2006, Dr. Katz issued a report addressing the issue of causation. CX 29 at 240-45. Dr. Katz summarized Claimant's complaints and history with his knee, examined some additional medical records and commented on Dr. Davenport's June 29, 2004 report. CX 29 at 240-44. In his physical examination, Dr. Katz found left quadriceps atrophy, mild patellofemoral crepitus with active flexion and extension of the left knee, and slight posteromedial joint line tenderness. CX 29 at 242. Dr. Katz noted that Claimant had more

significant tenderness over the right knee, posteromedial corner. CX 29 at 242. With regard to causation, Dr. Katz opined, "The use of a heavy clutch over time does in fact increase stress on the patellofemoral joint and on the femoral tibial joint. This may over time lead to repetitive micro trauma causing wear and tear on the joint. On or about November 19, 2003, when the patient's vehicle went into a hole, this caused an acute injury to the knee. The combination of the repetitive microtrauma, and the subsequent acute injury led to the findings at the time of arthroscopy on May 21, 2004. Those findings in turn led to the prediction of the need for future surgical intervention as the knee continues to wear out over time." CX 29 at 245. Dr. Katz also stated that Claimant "has findings consistent with quadriceps atrophy. He was reminded of the importance of doing the exercises that he has previously learned in therapy so as to protect his knee. Since his insurance company continues to refuse responsibility for the care of his knee; and given that he is consequently both unemployed and homeless, while he is at the same time caring for his two children, this will certainly be a difficult task to accomplish." CX 29 at 245.

On August 29, 2006, Dr. Katz issued a supplemental report upon reviewing the photographs in CX 31A. CX 32. Dr. Katz stated, "Using a goniometer (angled guide) and photograph 54,[3] the knee flexion a[t] 54 degrees is measured. My understanding is that the patient pushes his seat back further when he utilizes the vehicle; and therefore his actual knee flexion would be less (in other words his knee would be more extended). The more extension, the more force applies to the femorotibial joint. The more flexion, the more force applied to the patellofemoral joint." CX 32 at 273. Dr. Katz also stated, "It should be noted that the clutch, which is attached to the floor at its base, requires plantar flexion of the left ankle in order to push it into place. This movement requires a counter balancing action by the quadriceps musculature in order to stabilize the knee during this activity. The contraction of the quadriceps increases the force applied on both the patellofemoral joint and on the femorotibial joint. In addition, there is force transmitted through the clutch pedal into the heel and subsequently into the tibia and therefore the femorotibial joint as the clutch is engaged. This repetitive force across the knee joint on a daily basis for several years can lead to degenerative joint disease over time." CX 32 at 273. Dr. Katz added, "the sudden impact sustained by the distal femur at the time of the accident on November 19, 2003 would subject the distal femur to further damage. This would directly correspond with the findings at the time of arthroscopy…" CX 32 at 273.

On March 1, 2006, Dr. Katz testified at the hearing. He opined, based on his arthroscopic findings, that Claimant's left knee degeneration could be blamed on "either or both" the repetitive use of clutches or the November 2003 impact event. Tr at 33, 117, 126, 129. Dr. Katz explained that such an accident would cause greater damage if there was previous wear and tear from microtrauma. Tr at 31, 130.

Dr. Katz testified that wear and tear on a knee are caused by macrotrauma and repetitive microtrauma. Tr at 28. He explained, "Macrotrauma usually refers to a single major event with a lot of force, and repetitive microtrauma refers to minor events over time that build up cumulatively to cause damage. [Claimant's] knee is the result of both of those problems." Tr at 28. He explained how cumulative microtrauma causes damage, particularly to the kneecap: "as you begin to bend the knee, the kneecap comes into the thigh bone, so there's more force there,

[3] This appears to be a typographical error, as photograph 54 does not exist. However, the angle measurement and other observations are reasonably related to the photographs submitted.

which, in turn, causes more friction between those two structures." TR at 28. He explained that the "friction can cause wear and tear which causes chondromalacia, which is the softening of that coating on the end of the bone." TR at 29. He testified that Claimant's two areas of chondromalacia -- on the bottom, inner side of the thigh bone and on the kneecap -- "are the reasons that he had and continues to have problems with his knee." Tr at 27.

Dr. Katz testified that he understood from Claimant that the first time he injured his knee was November 19, 2003. Tr at 99. Dr. Katz testified, "I believe that while [Claimant] was driving that machine the machine went into a pothole which caused a jolt to the machine and caused a direct force on his left knee." Tr at 18. Dr. Katz testified that he learned about the accident from Claimant but he had no reason to doubt what Claimant described. Tr at 23.

Dr. Katz testified that the November 2003 accident caused two different problems – one from the increased force on his knee joint and the other from the position of his knee. Tr at 30. Dr. Katz testified, "My assumption is that the force went through his foot into the leg bone, and then into the knee joint. And depending on how much bending there was of his knee at the time, the kneecap has extra force and the end of the thigh bone has extra force, both of which can cause that single macrotrauma even if there had been no preexisting problem whatsoever, and that causes wear and tear which causes the break down of the end of the thigh bone which causes what we found at the time of surgery." Tr at 30-31. *See also* Tr at 127. Dr. Katz conceded that he did not know the position Claimant's leg at the time and that it might make a difference "[b]ecause, particularly for the end of the femur chondromalacia, the more that his knee was in extension, the more that would be consistent with an impact at that location causing that. The more the knee is bent, the more that would be consistent with the patella being affected at the time of the impact." Tr at 127. However, Dr. Katz testified that there were surgical findings consistent with either the knee being bent or straight at the time of impact. Tr at 138.

Dr. Katz stated that it was consistent with the type of injury Claimant suffered on November 19, 2003 that he did not seek treatment until December 10, 2003 because "[w]hen that injury occurred, it causes inflammation, and as you continue to use something that's inflamed, it gets more inflamed, which eventually gets to the point where the patient becomes aware that there's a problem, and that when they seek medical care….That happens all the time." Tr at 35.

Dr. Katz testified that his surgical findings and the areas of chondromalacia were consistent with repetitive stress from pushing clutches over a 15 to 18-year period because "those two different areas are the two areas that would be affected most. The patella from the knee flexion, and the femur from once the clutch is already all the way pushed down where the highest force is from a direct load." Tr at 124-25. *See also* Tr at 30. He testified that pushing in a clutch "causes force to the knee, and the muscle control of the quadriceps pushing on the patella causes a certain amount of force to the knee. So those two things together increase the force on the joint which then leads to wear and tear over time." Tr at 123. Dr. Katz explained that it is typical that a condition may be developing for a long time before it finally becomes symptomatic and the patient seeks treatment. Tr at 125. Dr. Katz testified that he was familiar with microtrauma being caused by a "clutch-type" movement. TR at 30.

Dr. Katz testified that he disagreed with Dr. Davenport's opinion that pushing on a clutch presents minimal resistance. TR at 112. Dr. Katz described the machines as having a "heavy clutch." Tr at 119. Dr. Katz understood that the clutch in a top handler or a side pick "requires…a fair amount of force to push that clutch in in order to drive the vehicle." Tr at 119-21. Dr. Katz testified that this understanding was based on discussions with Claimant. Tr at 120. He stated, "The more force that's required to push down on that clutch, and particularly the closer your seat may be to the clutch, requires the knee to be flexed, so that increases the force between the kneecap and the femur. And because of that, you get more friction and more wear and tear. So if you're doing that over a long period of time with something that requires a lot of force to push in, it's going to be worse than if you're driving some great luxury car where pushing in the clutch takes no effort. Even with that luxury car, you may have the same problem, but the likelihood is the severity may be a lot less." Tr at 119. Dr. Katz also testified that he assumed Claimant would have to push the clutch "fairly frequent[ly] because those machines are moving and stopping and moving and stopping all day long, so I would assume that, therefore, you have to change gears frequently when you're doing that and controlling whatever it is you're moving." Tr at 122. Dr. Katz could not estimate how many times Claimant would have to push the clutch per shift. Tr at 122.

Dr. Katz conceded that Claimant did not report any knee pain or problems from operating clutches or any repetitive activity. Tr at 54-57, 62, 100-01, 103, 117. Dr. Katz conceded, "I was totally unaware that there was any component of repetitive microtrauma during the time I was treating him." Tr at 117. This was because he was primarily focused on assessing and treating Claimant's traumatic injury. Tr at 57. Dr. Katz testified that he did not express any opinions about causation before he was requested to do so by Claimant's counsel because it had not been relevant to treatment. Tr at 47-51, 116-18, 133-34. He testified that when he was asked to opine on causation, "that's when I found out about the clutch and this issue that he was doing that over a long period of time." Tr at 118. Dr. Katz testified that Claimant's counsel discussed theories of causation, but that Dr. Katz brought up the issue of cumulative trauma based on his knowledge "that [Claimant] was driving that machine for so many years." TR at 48-49.

Dr. Katz testified that an actual attempt to go back to work is "the best test there is" of whether the person can do the work at that time. Tr at 38-39. Dr. Katz testified that he had no reasons to doubt Claimant's statement that he tried working for 45 minutes but could not do it, although he "was disappointed when [he] heard that." Tr at 39. Dr. Katz testified that "we probably tried to send him back too soon at that point." Tr at 41.

Dr. Katz testified that after Claimant was unable to return to work, it would be inadvisable to return him to work again without further treatment. Tr at 43-44. Dr. Katz testified that he wanted Claimant to continue physical therapy to strengthen his knee after he was unable to return to work so that his knee could be more functional and could handle more, but the physical therapy was not covered. Tr at 40-41. Dr. Katz testified that Claimant will require further treatment for his knee, possibly including a cartilage replacement procedure. Tr at 41-42.

Dr. Katz testified that the left quadriceps atrophy he noted on February 21, 2006 is consistent with Claimant's inability to strengthen his muscles through physical therapy and home exercises. TR at 106. Dr. Katz also testified that Claimant's homelessness limited his ability to

continue his physical therapy exercises at home because "he's more in a survival mode now than having the luxury of spending time doing his exercises." Tr at 131.

Dr. Katz testified that there was never any indication that Claimant was magnifying his symptoms or being deceptive in making his condition appear worse that it actually was. Tr at 142. Dr. Katz agreed that, if anything, Claimant was under-reporting in that he did not report prior knee problems. Tr at 142. Dr. Katz testified that the fact that Claimant did not remember his earlier knee problems "makes him a typical patient." Tr at 143. Claimant was also typical in not complaining about his knees earlier because longshoremen "tend to be a tougher breed overall, and they tend to minimize injuries more so than other employees do." Tr at 143-44.

Dr. Davenport

Dr. Kent Davenport, M.D., was Employer's medical expert in this case. He wrote reports and testified by deposition. He is board certified in orthopedic surgery. RX K at 70. Dr. Davenport has been doing independent medical exams for about six or seven years, during which time he has done at least sixty exams. RX M at 124-25.

On June 18, 2004, Dr. Davenport evaluated Claimant. CX 15 at 77-78; RX I at 63-64; RX M at 159-60. Dr. Davenport noted, "[Claimant] states that he banged his knee in June 2003 while at work but otherwise denies any prior problems with his left knee before 11/19/03 when while working, driving a top-loader, his left knee became irritated with using the clutch. [Claimant] states that he reported his work injury, however, there is no prior report until 12/10/03 when in Dr. Rotkin's evaluation it notes that this was a work injury. No further complaints with his left knee were noted until 04/07/04…" CX 15 at 77; RX I at 63; RX M at 159. Dr. Davenport's impression, based on the March 5, 2003 x-rays, was "mild osteoarthritis of the left knee pre-existing the accident report of 11/19/03." CX 15 at 78; RX I at 64; RX M at 160. He opined, based on when Claimant sought medical care and filed accident reports, that his knee problems were pre-existing and "transient in nature." CX 15 at 78; RX I at 64; RX M at 160. Dr. Davenport also opined, "At this time, [Claimant] has an excellent range of motion with no muscle atrophy, good strength and no discomfort. I believe that [Claimant] can return to work, however, the determination of the exact etiology of his left knee condition would have to await further records from Laurence Rotkin, M.D. along with a description of the medical visit of 03/05/03 at which time a left knee x-ray was obtained." CX 15 at 78; RX I at 64; RX M at 160.

On June 29, 2004, Dr. Davenport issued another report based upon additional medical records. CX 15 at 79-81; RX J at 65-67; RX M at 83, 161-63. Dr. Davenport noted that Claimant had seen Dr. Rotkin on June 18, 2002 with pain behind the left knee. CX 15 at 79; RX J at 65; RX M at 84, 161. Dr. Davenport also noted, "[Claimant] was seen by Dr. Rotkin on 12/05/03 for a physical examination. No complaints were noted of the left knee nor was any reference given to a left knee injury until 12/10/03 when he stated that he hurt his left knee three weeks ago in the evening. He noted that using his left leg continuously pumping up and down on the clutch caused the discomfort." CX 15 at 80; RX J at 66; RX M at 162. He also noted that "[n]o additional complaints were noted for 4 months when he again complained of knee problems." CX 15 at 80; RX J at 66. Based on the timing of these complaints, Dr. Davenport opined, "It is apparent from the medical records that [Claimant] did not sustain any significant

work injury on or about 11/19/03." CX 15 at 80; RX J at 66; RX M at 162. He also opined that "[Claimant's] left knee condition is entirely as a result of pre-existing degenerative arthritis which was first noted on x-ray on 03/05/03. I believe that these symptoms continued on intermittently. There is no real documentation of an accident on 11/19/03 in the medical records." CX 15 at 80; RX J at 66; RX M at 162. Dr. Davenport testified that he concluded that Claimant's left knee problems pre-existed the November 2003 accident, based on the records of knee problems in June 2002 and in March and April 2003. RX M at 85.

Dr. Davenport further opined, "The medical records do not support [Claimant's] contention that he drove into a hole which caused his knee to jam. The medical records suggest that he irritated his knee while using a clutch. I do not feel that using the clutch on his truck would have caused or aggravated his pre-existing degenerative arthritis of the femoral condyle. I do not feel that this is in anyway related to his subsequent need for surgery….if any type of aggravation of his pre-existing problem were to have occurred it would have certainly cleared within six weeks following his initial complaint." CX 15 at 81; RX J at 67; RX M at 163. Dr. Davenport also opined, "Using the clutch is basically a minimal resistance activity similar to walking and does not involve impact, rotation, twisting, or trauma to the knee. I do not feel that [Claimant's] allegations of a knee injury while driving a truck and using the clutch would have in anyway caused him to need surgery for his left knee." CX 15 at 81; RX J at 67; RX M at 163.

On February 6, 2006, Dr. Davenport issued another report based on additional medical records. RX M at 212. He noted that Claimant's musculoskeletal examination was normal when he was seen for unrelated problems on November 30, 2004. RX M at 141. Dr. Davenport also opined, "These records reveal that [Claimant] was released to regular duty on 08/31/04 by Dr. Katz with no restrictions….I agree with Dr. Katz that [Claimant] is fit for regular duty. I do not feel he needs additional surgery. My basic assumption is that [Claimant's] left knee condition as a result of the injury of 11/19/03 should have resolved within six weeks following the subject accident. Indeed, [Claimant] did not return to see Dr. Rotkin on 01/10/04 for his regular left knee appointment. It seems that his aggravation had cleared by that time." RX M at 214.

On February 10, 2006, Dr. Davenport testified by perpetuation deposition. RX M. Dr. Davenport opined, based on Claimant's knee complaints and x-ray on March 5, 2003, that Claimant had degenerative arthritis of the left knee prior to November 2003. RX M at 82, 84-85, 100, 104-05, 118-19, 121. Dr. Davenport testified that Claimant was experiencing symptoms of his pre-existing arthritis in March 2003, but it is "impossible to say" if he had arthritis when he was experiencing knee symptoms in 2002. RX M at 119.

Dr. Davenport testified that Dr. Katz's surgical findings were consistent with degenerative arthritis. RX M at 81. Dr. Davenport testified that the surgical findings show a very small lesion that "would have gradually happened over time, and the thing that makes me think that more is the fact that he had x-rays which showed arthritis…14 months prior…to the surgery." RX M at 118. Dr. Davenport testified that Claimant has grade II chondromalacia on the lateral facet of the patella and grade III chondromalacia on the femoral condyle and that "there's nothing that I can tell you that will allow me to explain why he has these lesions in these particular places." RX M at 119. He opined that "There's no specific association between [Claimant's] operative findings and any particular trauma to the knee." RX M at 82.

Dr. Davenport opined that Claimant's left knee problems are unrelated to his work. RX M at 87-88. Dr. Davenport testified that the cartilage in the knee joint always wears out gradually with aging, but that it can wear out faster due to weight, genetics, and other factors. RX M at 82, 107, 117-18. Dr. Davenport opined that Claimant's age and obesity "are two things that are going to increase the probability of him having arthritis in his knee." RX M at 134. *See also* RX M at 82. Dr. Davenport opined that Claimant's weight is "probably the main variable in his situation." RX M at 111. *See also* RX M at 87-88, 103,117-18.

Dr. Davenport testified that Claimant's clutch use did not cause trauma to his knee because the physical force involved in utilizing the clutch on a top loader is "basically a pushing, but it's not an impact….It's similar to walking up an incline." RX M at 142. Dr. Davenport testified that he advises his knee patients to avoid impact activity because "it dramatically increases the rate over all of those other activities of daily living, such as walking, walking up stairs, walking up an incline. Those are all minor things compared to impact. Impact is where you draw the line. Arthritis isn't going to increase from pushing in a clutch." RX M at 146. Dr. Davenport added, "If you were to take a person and send them to physical therapy for arthritis, they would put them on a machine to lift weights, which is much the same as pushing in a clutch on a car. So you can't say, 'Don't do that. It's not good for you.' The truth is it would probably build his muscles up, so it would be better for his leg." RX M at 146. Dr. Davenport testified that he has driven cars with clutches over the years and conceded that there was some variation in the force required to push in the clutch. RX M at 143. However, Dr. Davenport did not understand much about longshore work or Claimant's work in particular. RX M at 136. Dr. Davenport understood that Claimant "drives a top loader, a side pick, or a cab," but Dr. Davenport conceded that he did not know what those machines were. RX M at 137.

Dr. Davenport testified that he understood that Claimant prefers to drive the cab because "it hurts his leg less, but that was only on one occasion, December 10th, 2003, and he was given a note stating he should…just be driving the cab until January 10th, 2004, and then he was to return on January 10th, 2004 for an update, and he did not show up." RX M at 137. Dr. Davenport testified that he assumed Claimant returned to driving all three machines again after January 10, 2004, "unless he was reassigned somehow." RX M at 137. Dr. Davenport stated, "I assumed that he did not show up for his return appointment on January 10, 2004 because his knee was no longer bothering him. I also assumed that he did not need another note for work." RX M at 138. When asked whether the fact that he was not driving the two problematic machines correlates with the fact that his knee was not hurting a month later, Dr. Davenport stated, "There's nothing in the medical records that would allow me to know that. There's nothing that I've reviewed that points me in that direction….this is coming from you, and I have no independent knowledge of what he was doing at work. All I know is that his knee was not bothering him." RX M at 141.

When asked why clutch use did not aggravate Claimant's condition, Dr. Davenport stated, "I felt that use of the clutch is certainly within the activities of daily living. [Claimant] is 5'11" tall and weighs 260 pounds. Use of his clutch is certainly not as traumatic as climbing a series of stairs or walking up a slight incline. I didn't feel that it caused any significant injury, and part of that has to do with his reporting of the injury and his follow-up following that injury. [Claimant] originally reported to Dr. Rotkin…on December 5th, 2003 for physical examination at which time he was completely normal. Five days later he was seen by Dr. Rotkin with left knee

pain which began three weeks previously when he was working the clutch with his left knee. And then specifically he asked for a note that would indicate that he should not be driving a top loader or a side pick. And so Dr. Rotkin gave him a note on December 10, 2003 stating that he should just be driving the cab until January 10, 2004, which is a month following, and then he was going to return in a month. Well, in fact, [Claimant] never did return for follow up on that examination. He followed up twice in February, once with hypertension and once with a headache, but there are no further complaints of left knee pain. There's no additional note requested regarding his work duties, and there's no further note at all of anything about the knee until four months following the initial supposed accident." RX M at 86-87.

Dr. Davenport testified that he has seen "more than a hundred" patients with arthritic conditions similar to Claimant's knee. RX M at 129-31. He agreed that changes in pain may correlate with physical activity. RX M at 131-33. He testified that "Some people have a lot of arthritis and don't have many symptoms. Other people have small amounts of arthritis and have more symptoms, and a lot of people it comes and goes….So you can have it and then it's gone and then you can be symptomatic again." RX M at 135.

Dr. Davenport testified that he agreed with Dr. Katz's decision to return Claimant to work after August 25, 2004. RX M at 89.

Dr. Davenport repeatedly questioned Claimant's reliability and credibility. When asked if he thought Claimant was trying to deceive him when he could not remember why he had the March 2003 x-rays, Dr. Davenport stated, "if you hurt your knee so much that it was difficult to walk on and you had an x-ray, and your doctor told you to lose weight, you might remember that somehow." RX M at 121-23. Dr. Davenport also believed that the fact that Claimant denied prior knee problems called into question Claimant's reliability as a historian. RX M at 85. Dr. Davenport repeatedly referenced an emergency room note regarding Claimant's possible history of marijuana use and argued that it was relevant because "[i]t may speak to his reliability as a historian which comes into question in other places in this evaluation." RX M at 94, 125-28.

When asked about how he determines deception, Dr. Davenport testified, "if we ask how did his alleged injury occur, Dr. Rotkin says he was working a clutch with his left knee on December 12, 2003 and wanted a note given so that he wouldn't have to work with those particular vehicles that have that particular clutch for a month. And then when he goes to Dr. Katz on April 14, 2004, he says that a machine went into a hole and he then hurt his knee, and there's nowhere in there that mentions this hole, but if you look at his LS 202 on May 20th, 2004, which is the day before the surgery, it says that the machine went into a hole, but the first complaint of that was five months after the reported accident, which is working a clutch. So, you know, he's a poor historian. So that's the logical inference you can make from that. I can't tell whether it's purposefully lying to me, whether he wants this because he needs money from the settlement, whether he truly believes that this happened. All I can do it look at the medical records and try to deduce from that what actually happened…" RX M at 125-26.

Dr. Davenport testified that he has some training and experience in recognizing when examinees are being deceptive or overstating their pain and symptoms. RX M at 125-28. However, Dr. Davenport testified that he usually notes in his report when he feels a patient's

subjective complaints do not match the objective findings, and that he did not make any such notations regarding Claimant because it "was a normal examination." RX M at 128.

Dr. Davenport also questioned Dr. Rotkin and Dr. Marumoto's reliability. He noted that there was nothing to indicate that Dr. Rotkin ever conducted an orthopedic examination of Claimant's knee. RX M at 91. Dr. Davenport testified that Dr. Rotkin apparently relied solely on Claimant's subjective complaints. RX M at 92. Dr. Davenport testified that he has known Dr. Rotkin briefly and knows that "[h]e's an internist and is not an orthopedic surgeon….I don't think he's qualified to render orthopedic evaluations." RX M at 99. Dr. Davenport also noted that Dr. Marumoto evaluated Claimant without any pre-existing x-rays or complete records. RX M at 91. Dr. Davenport testified that he knows of Dr. Katz's work from past independent medical examinations and believes that Dr. Katz is "a reasonable doctor." RX M at 99.

On June 27, 2006, Dr. Davenport issued a supplemental report.[4]

On or around March 6, 2006, Dr. Davenport sent a hand-written note to Employer's counsel Mr. Lezy, commenting on some additional medical records. RX L at 71-72. He stated, "These additional reports in no way change the opinions I voiced in my reports of 6/18/04, 2/6/06, 6/29/04 or my depo of 2/10/06." RX L at 72.

On September 3, 2006, Dr. Davenport issued a supplemental report based on Claimant's deposition transcript, Dr. Katz's deposition transcript, the photographs taken by Claimant's and Employer's counsel, and the declaration of Christopher Lee. RX R at 297. In this report, Dr. Davenport responded to specific questions, presumably posed by Employer's counsel. RX R. Dr. Davenport opined that Claimant's left knee condition was not caused by acute trauma because "[Claimant's] original statement was that his knee was fully extended at the time of his injury. However, photographs CL-8 through CL-16 will show that the normal position of [Claimant's] knee while operating the machine in question would be bent at a 30-40 degree angle. Dr. Katz was unaware of [Claimant's] knee position at the time of the injury." RX R at 298. Dr. Davenport also opined that Claimant's knee condition was not caused by clutch use because "certainly heavy equipment operators or people who drive vehicles with clutches are quite prevalent in society and yet there is no medical paper that I have seen or that Dr. Katz's [sic] has quoted suggesting a correlation between the use of a clutch and patellofemoral arthritis. In reviewing the medical records, there is no mention by Dr. Katz of microtrauma or macrotrauma until 5 months after he finished treating [Claimant]. In my deposition of 02/10/06, I noted that pushing the clutch on a truck was similar to the exercises used in physical therapy to strengthen the knee and that this action was beneficial to [Claimant's] knee. His attorney at that point agreed with me." RX R at 298. Dr. Davenport added, "[Claimant] is now complaining of bilateral knee pain. This would reinforce the idea that his complaints are indeed related to his obesity and preexisting arthritis as his right knee has not been used to operate a clutch and was not injured in the subject accident of 11/19/03." RX R at 299-300.

[4] This report is referenced in Dr. Davenport's 9/3/06 report (RX R), but it was not submitted as an exhibit.

When asked about the significance of Claimant's knee complaints in 2002 and 2003, Dr. Davenport responded, "Again, [Claimant] is a poor historian…. [Claimant] first complained of left knee pain on 06/18/02 and 03/03/03 at which time he had been off work for 11 months. Evaluation of Dr. Katz's opinions on 02/21/06 again brings out many facts and opinions that he declined to note when he was actually treating [Claimant]. Dr. Katz's evaluation of 02/21/06 appears to be an Independent Medical Evaluation by a treating physician. A review of Dr. Katz's billing records may reveal this to be so. If indeed Dr. Katz has assumed the position of independent medical evaluator, then he is in conflict in his role as a treating physician." RX R at 299. Dr. Davenport added, "An independent evaluation of all of the medical records is necessary to form an opinion regarding the etiology of [Claimant's] left knee pain. I do not believe that Dr. Katz has done this. Again, his role as a treating physician is that of an advocate for the patient and should not be confused with an Independent Medical Evaluation." RX R at 300.

ANALYSIS

1. *Fact of Injury and Causation*

a. *Cumulative Trauma Injury from Clutch Use*

The parties dispute what time period is relevant for evaluating Claimant's cumulative trauma claim. Claimant argues that he sustained a cumulative trauma injury from using clutches on heavy machinery from the time he began work for Employer through his last day of work on May 16, 2004. ALJX 3 at 1. Employer argues that Claimant did not suffer any cumulative trauma from clutch use, but that any consideration of cumulative trauma should be limited "to his operation of side-pick and top-handler machines for the approximately 3 year period prior to his claimed date of injury." ALJX 6 at 15. Employer makes this argument based on the fact that prior to 2000, Employer used straddle carriers as its standard container handling equipment, and there is no evidence regarding whether straddle carriers have clutches. ALJX 6 at 6, 15. I note, however, that both Employer and Claimant failed to ask the representatives from Employer who testified about the straddle carriers whether those machines have clutches. On the other hand, Claimant testified that his work for Employer always involved using clutches on machines. Tr at 186. This testimony, which Employer failed to rebut, provides evidence that the straddle carriers had clutches. Therefore, given that Claimant's work for Employer always involved clutches, I find that the relevant period for evaluating Claimant's cumulative trauma claim is from when he began working for Employer in 1987 or 1988 through his last day on May 16, 2004. I also find that, even accepting Employer's limited time period of the three years before Claimant's claimed date of injury, there is sufficient evidence that Claimant suffered cumulative trauma from clutch use that contributed to and aggravated his knee condition during that time period.

Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. § 920(a). Thus, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979), and working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine*

Shop, 13 BRBS 326 (1981). The presumption cannot be invoked if a claimant shows only that he suffers from some type of impairment. *U.S. Industries/ Federal Sheet Metal, Inc.* v. Director, OWCP, 455 U.S. 608, 615 (1982). However, a claimant is entitled to invoke the presumption if he or she presents at least "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990).

I find that Claimant is able to establish a *prima facie* of cumulative trauma injury to his left knee. Dr. Katz opined in his February 21, 2006 report that "The use of a heavy clutch over time does in fact increase stress on the patellofemoral joint and on the femoral tibial joint. This may over time lead to repetitive micro trauma causing wear and tear of the joint…. The combination of the repetitive micro trauma, and the subsequent acute injury led to the findings at the time of arthroscopy on May 21, 2004." CX 29 at 245. In his August 29, 2006 report, Dr. Katz described in detail the body mechanics and forces involved in pushing on a clutch and opined, "This repetitive force across the knee joint on a daily basis for several years can lead to degenerative joint disease over time." CX 32 at 273. Also, Dr. Katz testified at the trial that Claimant's knee condition is caused by either or both the traumatic injury on November 19, 2003 or the cumulative trauma from clutch use. TR at 33, 126, 129. Dr. Katz also testified that Claimant's surgical findings and specific locations of his chondromalacia were consistent with repetitive stress from pushing clutches over many years. Tr at 30, 124-25. This evidence is sufficient to establish a *prima facie* case that Claimant's work for Employer caused cumulative trauma to his left knee, thus invoking the section 20(a) presumption.

Once the section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case, and the judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Employer has presented substantial evidence that Claimant's knee condition is not causally related to his employment. Dr. Davenport opined that Claimant's knee condition is due to his obesity and his age. RX M at 82, 134. Dr. Davenport also testified at his deposition that "[a]rthritis isn't going to increase from pushing a clutch" because it is a minimal resistance activity similar to "other activities of daily living, such as walking, walking up stairs, walking up an incline" that have a "minor" effect compared to impact activities. RX M at 146; CX 15 at 81. Lastly, Dr. Davenport opined that Claimant's knee condition was not caused by clutch use because "certainly heavy equipment operators or people who drive vehicles with clutches are quite prevalent in society and yet there is no medical paper that I have seen or that Dr. Katz's [sic] has quoted suggesting a correlation between the use of a clutch and patellofemoral arthritis." RX R at 298. This evidence is sufficient to rebut the section 20(a) presumption.

Because Employer has rebutted the presumption, I now must weigh all of the evidence and decide based on the record as a whole whether Claimant has met his burden of proving causation. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982); *Director, OWCP v.*

Greenwich Collieries, 512 U.S. 267 (1994). In weighing medical evidence concerning a worker's injury, a treating physician's opinion is normally entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998).

I credit the opinions of Dr. Katz over those of Dr. Davenport, primarily because Dr. Katz was Claimant's treating orthopedist. Dr. Katz began treating Claimant in April 2004, conducted his knee surgery in May 2004, and followed his recovery and progress toward returning to work through 2004. Therefore, Dr. Katz's opinions are based on many physical examinations of Claimant and discussions of his symptoms and his job duties. Moreover, I find that Dr. Katz testified credibly at the hearing in this case. In contrast, I note that Dr. Davenport only met Claimant once and did not have "any independent recollection of him." RX M at 122. Consequently, his opinions were based upon incomplete information and incorrect assumptions about Claimant's work and treatment history. I also find that Dr. Davenport's attacks on the credibility of Claimant and Dr. Katz, his unnecessarily adversarial approach to his deposition, and his work primarily on behalf of employers demonstrate bias.

Dr. Davenport's bias is demonstrated by his attacks on the credibility of Claimant and Dr. Katz. Dr. Davenport repeatedly noted Claimant's inability to remember prior knee problems or why he had knee x-rays in March 2003, concluding that Claimant was not reliable as a historian. RX M at 85, 121-23. Dr. Davenport also referenced a vague emergency room note regarding a possible history of marijuana use as relevant because "[i]t may speak to his reliability as a historian…" RX M at 94, 125-28. In addition, when asked about how he determines deception, Dr. Davenport testified that he could make a logical inference that Claimant was a poor historian from the fact that he first reported to Dr. Rotkin on December 12, 2003 that he had problems with his knee from working a clutch, but then he reported to Dr. Katz on April 14, 2004 that he injured his knee when the machine went into a hole, and then he wrote on his LS 202 on May 20, 2004 that the machine went into a hole. RX M at 125-26. However, this is misleading because in fact, Claimant reported on December 12, 2003 that he had injured his knee at work three weeks earlier and he had noticed since that that using clutches irritated his knee, which was consistent with his April 14, 2004 and May 20, 2004 complaints and reports. Moreover, despite Dr. Davenport's attempts during his deposition to discredit Claimant, he conceded that he usually notes when he believes an examinee is being deceptive or overstating but that he had not noted any such issues in his reports about Claimant.

With regard to Dr. Katz, when Dr. Davenport was asked about the significance of Claimant's knee complaints in 2002 and 2003, he responded, "Evaluation of Dr. Katz's opinions on 02/21/06 again brings out many facts and opinions that he declined to note when he was actually treating [Claimant]. Dr. Katz's evaluation of 02/21/06 appears to be an Independent Medical Evaluation by a treating physician. A review of Dr. Katz's billing records may reveal this to be so. If indeed Dr. Katz has assumed the position of independent medical evaluator, then he is in conflict in his role as a treating physician…. Again, his role as a treating physician is that of an advocate for the patient and should not be confused with an Independent Medical Evaluation." RX R at 299-300. I find that Dr. Katz acted consistently in his role as treating physician in that he did not opine on the issue of causation until he was requested to do so by Claimant's counsel, because it had not been relevant to his treatment of Claimant. Tr at 47-51, 116-18, 133-34. Moreover, I find that by commenting about the treating physician's role and

suggesting a review of Dr. Katz's billing records, Dr. Davenport inappropriately entered into legal argument and strategy, which further demonstrates his bias.

In addition, I note that Dr. Davenport was unnecessarily adversarial at his deposition. RX M. For example, Dr. Davenport argued with Claimant's counsel over the admissibility of his hand-written notes and denied access to a copy machine to photocopy them, even after Employer's counsel made clear that the notes were admissible. RX M at 24-26, 96. Dr. Davenport also appeared to give deliberately unspecific answers, including that he has done independent medical examinations "for a few years," RX M at 124, that he has "seen a few" similar knee conditions, RX M at 130, and that "maybe" he had seen the giant cranes near the airport. RX M at 136. Dr. Davenport also appeared to become argumentative with Claimant's counsel, stating "Do you have a question to ask me…regarding those people?" RX M at 130.

Lastly, I note that Dr. Davenport has been doing independent medical exams for six or seven years, and he estimated he has done at least 60 exams, including others for this Employer/Carrier. RX M at 100, 125. Although such work primarily on behalf of employers is not determinative of bias by itself, it adds weight to the other evidence discussed above.

In addition to these general reasons for findings Dr. Katz more credible than Dr. Davenport, I found Dr. Katz much more persuasive than Dr. Davenport on the issue of whether Claimant has suffered cumulative trauma from using clutches. Dr. Katz was quite credible when he testified in great detail about the body mechanics involved in pushing on a clutch. CX 32 at 273. He also testified in detail about how cumulative microtrauma causes chondromalacia. TR at 27-29. Dr. Katz, who actually conducted Claimant's arthroscopy, also testified credibly that the surgical findings and the specific areas of chondromalacia were consistent with repetitive stress from clutch use over many years. Tr at 124-25. Thus, Dr. Katz's opinions regarding cumulative trauma were credible because they were based mostly upon his objective findings from treating Claimant and a clear understanding of the mechanics of knee trauma.

Dr. Katz also appeared to have a more accurate and reasonable understanding of how much force or pressure it takes to push down the clutch of these machines, how the clutches work, and how often Claimant would have to use the clutch. TR at 119-121. In contrast, Dr. Davenport did not understand much about Claimant's work in particular. RX M at 137. He also conceded that he did not know what machines Claimant operated. RX M at 137. Dr. Davenport also was reluctant to acknowledge that there is variation in the amount of strength or effort required to push the clutches on different types of vehicles. RX M at 137.

Dr. Davenport also testified at his deposition that "[a]rthritis isn't going to increase from pushing a clutch" because it is similar to "other activities of daily living, such as walking, walking up stairs, walking up an incline," which have a "minor" effect on joints compared to impact activities, which dramatically increase the rate of arthritis. RX M at 146. However, even if pushing a clutch is more like activities of daily living, Dr. Davenport did not state that such minor activities have no effect. Similarly, Dr. Davenport opined that Claimant's knee condition was a "multifactorial experience" and that Claimant's age and obesity were the main factors. RX M at 82, 87-88, 111, 117-18, 134. However, Dr. Davenport did not state that cumulative trauma from pushing a clutch was not a factor at all. The legal test is not whether pushing clutches had a

dramatic effect on or were a main factor in Claimant's knee condition, but rather, the test is whether pushing clutches contributed to, combined with, or aggravated his knee condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, (5th Cir. 1986). Thus, Dr. Davenport's opinions are not persuasive, in light of the applicable legal standard.

I also note that, regardless of how relevant it was to the issue at hand or the question being asked, Dr. Davenport returned to the fact that Claimant did not seek treatment for his knee until December 10, 2003 and then did not seek treatment again until April 7, 2004, even though he was supposed to follow up on January 10, 2004. CX 15 at 77; CX 15 at 80; RX M at 214; RX M at 137-38; RX M at 86-87; RX M at 125-26. Based on the fact that Claimant did not return to Dr. Rotkin on January 10, 2004 for another note restricting him to driving cabs or for treatment for his knee, Dr. Davenport assumed that Claimant returned to driving top handlers and side picks around that time and that his knee was not bothering him. RX M at 137-28. Based on these assumptions, Dr. Davenport concluded that Claimant's November 19, 2003 accident either did not occur at all or was only a temporary aggravation that had resolved, and that pushing clutches did not aggravate or contribute to Claimant's knee condition. However, Claimant did not return to driving all of the machines after his note expired on January 10, 2004, but rather, he was able to drive cabs almost exclusively until March or April due to the high-low assignment system beginning anew in January. Thus, Dr. Davenport's opinions should not be credited as they were based on incorrect assumptions about Claimant's work and treatment history.

Dr. Davenport's remaining arguments are also not credible or persuasive. First, he testified that pushing clutches is "much the same" as lifting weights on a machine as part of physical therapy for arthritis, and that "it would probably build his muscles up, so it would be better for his leg." RX M at 146; RX R at 299. However, this is not persuasive given that Dr. Davenport is not a physical therapist. Claimant's own physical therapist thought he was not strong enough to return to work, which implies that the activities required in his work are not the same as those used to strengthen his knee in physical therapy. Second, Dr. Davenport pointed to the lack of any medical papers or studies "suggesting a correlation between the use of clutch and patellofemoral arthritis." RX R at 298. Dr. Davenport did not state that he or Dr. Katz performed an exhaustive search for such studies; he only stated that he had not seen any such studies and Dr. Katz had not quoted any. Moreover, Dr. Davenport did not state that there is any study proving that clutch use does <u>not</u> correlate with arthritis. Third, Dr. Davenport also argued that the fact that Claimant is now having bilateral knee pain "would reinforce the idea that his complaints are indeed related to his obesity and preexisting arthritis as his right knee has not been used to operate a clutch and was not injured in the subject accident of 11/19/03." RX R at 299-300. I find that the fact that Claimant has developed right knee problems, despite not having used clutches with his right leg, suggests that his knee problems are partially caused by non-work-related factors such as age and obesity. However, the fact that Claimant experienced problems and symptoms with his left knee years before his right knee confirms that clutch use contributed to or aggravated his left knee condition.

After weighing the evidence as a whole, I find that Claimant's work pushing clutches in the course of his employment for Employer contributed to his knee condition such that he sustained a compensable injury under the Act.

b. November 19, 2003 Traumatic Injury

Claimant alleges that he suffered a traumatic injury on November 19, 2003 when the machine he was operating hit a pothole while his leg was extended pushing in the clutch and his left knee was jammed. Employer argues that this incident never occurred, or if it did occur, it only caused a temporary aggravation on Claimant's pre-existing degenerative arthritis.

As stated above, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979), and working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

I find that Claimant has established a *prima facie* case of traumatic injury to his left knee. First, Dr. Rotkin noted on December 10, 2003, "Patient presents with work injury. Hurt his left knee about three weeks ago in the evening. He does not remember the exact time but he did report to his employer…" CX 8 at 52; RX H at 15; RX M at 169. On February 21, 2006, Dr. Katz opined, "On or about November 19, 2003, when the patient's vehicle went into a hole, this caused an acute injury to the knee. The combination of the repetitive microtrauma, and the subsequent acute injury led to the findings at the time of the arthroscopy on May 21, 2004." CX 29 at 245. Dr. Katz also opined on August 29, 2006 that "the sudden impact sustained by the distal femur at the time of the accident on November 19, 2003 would subject the distal femur to further damage. This would directly correspond with the findings at the time of arthroscopy…" CX 32 at 273. Dr. Katz also testified that Claimant's left knee condition could be caused by the November 19, 2003 traumatic injury or cumulative trauma from clutch use. TR at 33, 126, 129. He also testified that Claimant's surgical findings were consistent with his description of the November 19, 2003 accident. Tr at 30-31, 127, 138. This evidence is sufficient to establish a *prima facie* case that Claimant suffered a traumatic injury to his left knee at work, and therefore, the section 20(a) presumption has been invoked.

To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). I find that Employer has presented substantial evidence that Claimant's knee condition is not causally related to his employment. Dr. Davenport opined in his June 18, 2004 report that Claimant's knee problems were due to degenerative arthritis that preexisted any November 19, 2003 incident. CX 15 at 77-78; RX I at 63-64; RX M at 159-60. Dr. Davenport again opined in his June 29, 2004 report that based on the timing of Claimant's reports and complaints, "It is apparent from the medical records that [Claimant] did not sustain any significant work injury on or about 11/19/03." CX 15 at 80; RX J at 66; RX M at 162. Dr. Davenport also opined in his February 6, 2006 report that "[Claimant's] left knee condition is entirely as a result of pre-existing degenerative arthritis which was first noted on x-ray on 03/05/03. I believe that these symptoms continued on intermittently. There is no real documentation of an accident on 11/19/03 in the medical records." CX 15 at 80; RX J at 66; RX M at 162. This evidence is sufficient to rebut the section 20(a) presumption.

Because Employer has rebutted the presumption, I now must weigh all of the evidence and decide based on the record as a whole whether Claimant has met his burden of proving causation. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). In weighing medical evidence concerning a worker's injury, a treating physician's opinion is normally entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998).

Because Employer argues that Claimant fabricated the alleged November 19, 2003 accident, ALJX 6 at 14, I will first address the preliminary question of whether an accident occurred on November 19, 2003. I found Claimant to be a generally credible witness, and I found his description of the November 19, 2003 accident to be credible as well. I also note that Claimant's account of the November 19, 2003 accident at the trial, Tr at 187-191, 227-28, was appropriately consistent with his earlier descriptions as recorded in claims adjuster Heidi Kahlbaum's June 9, 2004 interview summary, CX 31A, and in his January 6, 2006 deposition testimony, CX 22. Claimant's descriptions of the accident as noted in the doctor's reports are also appropriately consistent. CX 8 at 52; CX 8 at 49; CX 15 at 77.

On the other hand, Employer's senior superintendent, Mr. Aguil, testified that he did not remember Claimant being involved in an accident on November 19, 2003. RX N at 222. Similarly, Employer's general superintendent, Mr. Park, testified that he did not recall an accident on November 19, 2003 and he did not believe such an accident occurred. RX O at 251-52, 259-60, 264. I find that the failure of these superintendents to recall the accident does not prove that it did not occur, especially since they each conceded that they do not remember much generally from that time period. RX N at 228; RX O at 259.

Employer also points to the absence of a contemporaneous accident report for the November 19, 2003 accident. However, Claimant credibly testified that Mr. Aguil helped him fill out an accident report immediately after the November 19, 2003 accident. Tr at 191. Claimant also testified credibly that Mr. Aguil told him on May 13, 2004 that they needed to fill out another accident report since the first one was misplaced and never filed. TR at 205-06, 232. Although he could not remember preparing either accident report, RX N at 223, 236-37, Mr. Aguil conceded that the May 13, 2004 accident report was partially written in his handwriting. RX N at 236. Again, Mr. Aguil's failure to recall filling out an accident report for Claimant is not determinative, especially given that he did not demonstrate a strong memory of accident reports generally. RX N at 237. Moreover, I note that Employer stipulated that Claimant's claim was timely noticed, which means that Employer at least concedes that Claimant told his supervisors about the accident or filed an accident report within thirty days of the injury.

Employer and Dr. Davenport also focused on the fact that Claimant did not report any injury to his knee during his December 5, 2003 appointment with Dr. Rotkin. However, Claimant testified that he did not complain about his knee because "I was there for a physical." Tr at 249. It is logical and credible that Claimant would not report any injuries during his annual physical exam that was for the purpose of renewing the licenses he needed for work. Moreover, the records show that Claimant returned to Dr. Rotkin just five days later, on December 10, 2003, and complained that he "[h]urt his left knee about three weeks ago in the evening." CX 8 at 52; RX H at 15; RX M at 169.

Employer also notes that Claimant did not call any union representatives to testify, even though he claims that he called them to evaluate and witness the accident site on November 19, 2003. ALJX 6 at 11-12. I note that Employer did not call the union representatives to testify either. Because neither party explained why no union representatives were called to testify, I decline to speculate or infer anything from this.

Based on all of the above, I conclude that Claimant was involved in an accident at work on November 19, 2003. Next, I must determine whether that injury caused, aggravated, or contributed to his current left knee condition.

As discussed above with regard to the issue of cumulative trauma, I found Dr. Katz to be generally more credible than Dr. Davenport because his opinions were based mostly upon his objective arthroscopic findings and information gained from treating Claimant, while Dr. Davenport's opinions demonstrated bias.

Dr. Katz opined that his arthroscopic findings are consistent with Claimant having suffered an acute injury on November 19, 2003 and cumulative trauma. CX 29 at 245; CX 32 at 273; Tr at 117. Dr. Katz explained that the accident caused greater damage given previous wear and tear from microtrauma than it would have otherwise. Tr at 31, 130. Given the timing of Claimant's complaints and treatment, and specifically that he had more problems with clutch use after the accident, Tr at 214-43, I find that the November 19, 2003 injury aggravated the knee condition that had already developed from cumulative trauma and degenerative arthritis.

As with the cumulative trauma issue, I find that Dr. Katz's opinions about the November 19, 2003 injury were credible because they were based on his arthroscopic findings and because he testified in detail about the effect of increased force on the knee joint. Tr at 30-31, 127. Although Dr. Davenport attempted to discredit Dr. Katz by stating, "Dr. Katz was unaware of [Claimant's] knee position at the time of injury," RX R at 298, I did not find this persuasive. Although Dr. Katz conceded that he did not know what position Claimant's leg was in at the time of the accident, Tr at 127, he testified that it did not matter because there were arthroscopic findings consistent with the knee either being bent or straight at the time of injury. Tr at 138.

In contrast, Dr. Davenport's opinions were not persuasive for the reasons stated above with regard to the cumulative trauma issue. In addition, I did not find it credible that an orthopedist who has seen "more than a hundred" arthritic knees, RX M at 129-31, could not provide any explanation for the particular locations of Claimant's chondromalacia. RX M at 119. Similarly, Dr. Davenport did not elaborate on his conclusory statement that "[t]here's no specific association between [Claimant's] operative findings and any particular trauma to the knee," RX M at 82. Lastly, as discussed above, Dr. Davenport's opinion that Claimant's November 19, 2003 injury was only a temporary aggravation was based heavily on the incorrect assumption that Claimant returned to using all of the machines in January 2004 without experiencing any knee problems. RX M at 86-87, 137-41, 214.

After weighing the evidence as a whole, I find that Claimant suffered a traumatic injury at his work for Employer such that he sustained a compensable injury under the Act.

2. Extent of Disability

In cases involving disputes over an injured worker's post-injury wage-earning capacity, the burden is initially on the claimant to show that he cannot return to his regular employment due to his work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If it is shown that the claimant cannot return to his past job due to a work-related injury, the claimant is presumed to be totally disabled unless the employer demonstrates the existence of suitable alternate employment in the geographical area where the claimant resides. *See, e.g., Bumble Bee*, 629 F.2d at 1327; *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). If the employer makes the requisite showing of suitable alternate employment, the claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he diligently tried to obtain such work, but was unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993).

In this case, the parties dispute whether Claimant is capable of returning to his regular employment due to his work-related injury. In determining whether the claimant has met his burden, the judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). A physician's opinion that the claimant's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988). Also, a claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989). On the other hand, a judge may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981).

Employer argues that Claimant's disability ceased on August 31, 2004 when he was released to return to his usual and customary work without restrictions. ALJX 5 at 26. On the other hand, Claimant argues that he tried unsuccessfully to return to work on August 31, 2004, and he remains unable to return to work due to weakness and pain in his knee.

Claimant testified that he attempted to go back on August 31, 2004, and that he was unable to do the work because it hurt his knee too much. Tr at 214, 262-67. I found Claimant's account of his attempt to return to work to be credible, especially given his testimony that he wanted to work because he was homeless and financially desperate. Tr at 211-12. In addition, Mr. Kaapuni's testimony that Mr. Takushi and Claimant were standing together when Claimant said he could not work supports Claimant's testimony that Mr. Takushi observed him trying to operate the machines. Although he could not remember whether Claimant told him on August 31, 2004 that he had tried to operate the machines, Mr. Kaapuni did recall that he found Claimant to be credible when he stated he could not do the work. Also, Mr. Kaapuni conceded that Claimant could have tried out the machines before check-in without violating any rules and without Mr. Kaapuni knowing. RX P at 274-79. Lastly, I reject Employer's argument that Claimant is not credible because Dr. Katz's records do not state that he attempted to return to work on August 31, 2004, ALJX 6 at 17. I note that Claimant did report to Dr. Rotkin on September 9, 2004 that he had attempted to return to work. CX 8 at 30; RX H at 34.

Dr. Katz found it credible, but disappointing, that Claimant was unable to work. TR at 38-40. He testified that an actual attempt to go back to work is "the best test there is" of whether the person can do the work at that time. Tr at 38-39. Dr. Katz admitted that "we probably tried to send him back too soon at that point." Tr at 41. Dr. Katz also stated that when he opined that Claimant could return to work, "unfortunately I wasn't really aware of what that meant." Tr at 68. The fact that Claimant's physical therapist opined as late as August 23, 2004 that Claimant was not ready to return to work, CX 8 at 25, confirms that Dr. Katz was mistaken in releasing Claimant to work on August 31, 2004. In addition, Dr. Rotkin noted on September 9, 2004, "[Dr. Katz] tells me that both he and physical therapist agree that the patient should be ready to go to work. I called the physical therapist…who in fact said that his feeling was the patient was not ready to go back to work [and] that Dr. Katz persuaded him…" CX 8 at 30; RX H at 34.

Claimant's physical therapist, Dr. Katz, and Dr. Rotkin each believe that Claimant continues to be unable to return to work. On September 29, 2004, the physical therapist opined, "Patient continues to report that pain and weakness restricts his functional status. He is not ready to return to work at this time because he cannot execute his job demands without aggravation." CX 12 at 64; RX H at 38; RX M at 189. CX 8 at 28; RX H at 35. Dr. Katz testified that when he made his own determination on September 30, 2004, he credited the opinion of the physical therapist that Claimant is not able to work because the physical therapist is able to test the patient's abilities with exercises that may simulate his work, evaluate the patient more frequently, and get to know the patient and his situation more closely. Tr at 89. I also credit the physical therapist's judgment that Claimant is not able to work because it is based on objective findings and because it is consistent with my finding above that Claimant's clutch use at work has caused cumulative trauma to his knee.

Dr. Katz also opined on September 30, 2004 that Claimant could not return to work because "[w]e really do not want him to do any squatting or leg extensions anyway and he believes that he cannot do his current job if he is not allowed to squat." CX 8 at 28; RX H at 35. In addition, Dr. Katz testified that the left quadriceps atrophy he noted in his February 21, 2006 exam was consistent with Claimant's inability to strengthen his muscles through therapy and home exercises so far. TR at 106. Dr. Katz opined that Claimant should continue to be off work because his knee is not strong enough to allow him to do his work, and he cannot strengthen it without further treatment and physical therapy. Tr at 40-41.

Based on all of the evidence above, I find that Claimant has met his burden of establishing that he is not capable of returning to his usual employment.

CONCLUSION

I find that, as a result of his work for Employer through May 16, 2004, Claimant sustained a cumulative trauma injury to his left knee. I also find that Claimant sustained a traumatic injury to his left knee on November 19, 2003, which aggravated his left knee condition. In addition, I find that Claimant is unable to return to his usual employment, and thus, is totally disabled. Consequently, Employer is liable for Claimant's disability, including the period of temporary total disability from May 17, 2004 through the present and continuing, and medical care for Claimant's left knee condition.

ORDER

1. Employer shall pay Claimant temporary total disability compensation at the compensation rate of $1,030.78 per week from May 17, 2004 through the present and continuing.

2. Employer is liable for medical care related to Claimant's left knee condition.

3. Employer shall pay Claimant interest on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. § 1961.

4. All computations are subject to verification by the District Director, who in addition shall make all calculations necessary to carry out this order.

5. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on counsel for Employer within 21 days of the date this Decision and Order is served. Counsel for Employer shall provide the undersigned and Claimant's counsel a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of Employer's Statement of Objections, Claimant's counsel shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

7. The parties will immediately notify this office upon filing an appeal, if any.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:eh